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SUPREME COURT, U. S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 71 - 331

HOWARD YEAGER, Warden, New Jersey State Prison at Trenton,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, *ex rel.*, EDGAR H. SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Howard Yeager, Warden, New Jersey State Prison, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 2, 1971, affirming the opinion and order of the United States District Court for the District of New Jersey entered on May 13, 1971. That judgment provided that a writ of habeas corpus would issue, unless within sixty days the State of New Jersey granted to respondent a new trial

on the indictment charging him with murder, at which trial certain admissions made by said respondent were not to be admitted in evidence. The aforesaid judgment is appended as Appendix A hereto.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is not reported and appears as Appendix B hereto. The opinion of the United States District Court for the District of New Jersey, not yet reported, appears as Appendix C hereto.

Jurisdiction

The judgment of the United States District Court for the District of New Jersey was entered May 13, 1971. The judgment of the United States Court of Appeals for the Third Circuit, affirming the District Court judgment, was entered August 2, 1971. Petitioner moved before the United States Court of Appeals for the Third Circuit for a stay of the issuance of its mandate for a 30 day period. The stay was granted on August 17, 1971. See Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. §2254 (1).

Questions Presented

I. Does the holding below conflict with this Court's decisions regarding the exclusion of pre-Miranda admissions?

II. Should an evidentiary hearing have been granted even though respondent had not met the criteria set forth

in *Procunier* v. *Atchley*, 400 U. S. 446 (1971); *Townsend* v. *Sain*, 372 U. S. 294 (1963); and 28 U.S.C. §2254 (d)(3)?

III. Was respondent's failure to exhaust his state remedies with respect to certain crucial admissions a bar to the consideration of the voluntariness of these statements?

IV. Was the District Court obliged to dismiss respondent's petition at the conclusion of the evidentiary hearing?

V. Were the admissions made to the psychiatrists rendered inadmissible at trial in spite of the fact that they were neither compelled nor coerced?

VI. Does the systematic relitigation in the federal courts of issues already resolved constitute an abuse of the writ of habeas corpus?

Constitutional Provisions and Statutes Involved

U. S. Const., Amend. V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

U. S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

28 U.S.C. §2254 (b):

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the

remedies available in the courts of the state or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

28 U.S.C. §2254 (d):

"In any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof or parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed to be correct, unless the applicant shall establish or shall otherwise appear, or the respondent shall admit—

. . .

(3) that the material facts were not adequately developed at the state court hearing . . ."

. . .

28 U.S.C. §2244 (a):

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the

judge or court is satisfied that the ends of justice will not be served by such inquiry."

Statement of the Case

National attention is focused on the case of Edgar H. Smith. On May 28, 1957, he was found guilty, and sentenced, to death for the bludgeon slaying of a 15-year old girl. Since that date, he has been confined in the New Jersey State Prison.

On May 13, 1971, the Honorable John J. Gibbons, Circuit Judge, sitting by designation in the United States District Court for the District of New Jersey, filed an opinion and order which provided for the issuance of a writ of habeas corpus within 60 days from that date unless the State granted to Edgar Smith a new trial. 28 U.S.C. §2241. Judge Gibbons further ordered that various admissions made by Smith would be inadmissible at the new trial. Judge Gibbons found that these statements "were all the result of coercion, and their admission at the trial violated the due process clause of the Fourteenth Amendment." Petitioner appealed to the Court of Appeals for the Third Circuit. On August 2, 1971, the Court of Appeals filed a per curiam opinion which affirmed and adopted the findings of the District Court.

Edgar Smith has for 14 years repeatedly utilized the machinery of the state and federal courts in an attempt to escape the consequences of the jury's verdict of guilt. A capsulized history of respondent's numerous appeals to

the state and federal courts is set forth below.[1]

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[1] Respondent's conviction was affirmed by the Supreme Court of New Jersey. That court considered the propriety of respondent's confession as "though its introduction had been opposed upon every conceivable legal ground." The court found no error in the admission of the confession. *State* v. *Smith*, 27 N. J. 133, 138 (1958). A petition for habeas corpus was dismissed by the United States District Court for failure to exhaust state remedies. Smith moved before the New Jersey Supreme Court for a new trial, which motion was denied. *State* v. *Smith*, 29 N. J. 561 (1959). Respondent made application to this Court for a writ of certiorari asserting that certain admissions introduced at trial were involuntary. Respondent's petition was denied. *Smith* v. *N. J.*, 361 U. S. 861 (1959). Smith again sought habeas corpus in the United States District Court for the District of New Jersey. After an extensive review of the facts the court held that respondent's admissions were voluntary. *United States ex rel. Smith* v. *State of New Jersey*, 201 F. Supp. 272 (D. N. J. 1962). The District Court's denial of respondent's petition for habeas corpus was affirmed by the Court of Appeals for the Third Circuit. The principal issue was the voluntariness of Smith's admissions. After a thorough review of the facts and circumstances surrounding Smith's apprehension and detention, the court found that the confession was freely given. *United States ex rel. Smith* v. *New Jersey*, 322 F. 2d 810 (3rd Cir. 1963). A petition for a rehearing *en banc*, was denied on September 9, 1963. Thereafter respondent filed a petition for certiorari with this Court, which petition was denied. *Smith* v. *New Jersey*, 376 U. S. 928 (1964). Respondent then filed a petition for post-conviction relief, which was denied by the Bergen County Court on April 17, 1964. The New Jersey Supreme Court affirmed the county court's denial, and in so doing held that the voluntariness of the admissions had been fully adjudicated by both the state and federal courts. *State* v. *Smith*, 43 N. J. 67, 74 (1964). A subsequent petition for habeas corpus was denied by the Bergen County Court, March 29, 1965, and leave to appeal was denied by the

(*Footnote continued on following page*)

The essential facts as found by the District Court are as follows (see Pa11 to 46):

On March 4, 1957, 15-year old Victorin Zielinski, was found bludgeoned to death in a sandpit in Mahwah, New

(footnote continued from preceding page)

New Jersey Supreme Court on April 13, 1965. A further petition for reconsideration was denied on June 22, 1965. Thereafter, on July 13, 1965, a second petition for writ of habeas corpus was filed in the United States District Court for the District of New Jersey. This petition was denied on June 23, 1966. Respondent then filed an application for reconsideration of the petition and a supplement to the petition for writ of habeas corpus. On July 20, 1966, the application was denied. Respondent appealed to the United States Court of Appeals for the Third Circuit from this denial. The Court of Appeals affirmed, finding that their earlier decision *U. S. ex rel. Smith* v. *State of New Jersey*, 322 F. 2d 819 (3rd Cir. 1963) was dispositive of the issues now raised by respondent. The court further held that respondent, by his attorney, had waived an evidential hearing during the 1961 habeas corpus proceedings. *United States ex rel. Smith* v. *Yeager*, 395 F. 2d 245 (3rd Cir. 1968). This Court granted respondent's petition for certiorari and reversed finding that respondent had not waived an evidential hearing through his attorney in 1961. This Court remanded the matter to the District Court for a determination as to whether an evidential hearing was warranted. *Smith* v. *Yeager*, 393 U. S. 122 (1968). On August 5, 1970, the Federal District Court for the District of New Jersey ruled that respondent's admissions were not involuntary under *Greenwald* v. *Wisconsin*, 390 U. S. 519 (1968). On November 30, 1970, the District Court ruled that an evidentiary hearing be conducted for the purpose of determining whether certain specified admissions of respondent were voluntary under the Federal Constitution (Pa55). An evidentiary hearing was thereafter conducted before Judge Gibbons resulting in the order and opinion of May 13, 1971 (Pa7 to 46). The Court of Appeals for the Third Circuit affirmed the District Court (Pa3 to 6).

Jersey. The following evening, March 5, 1957, officers investigating the homicide received certain information implicating Edgar Smith in the murder. As a result of this information Edgar Smith was taken into custody at 11:30 p.m. March 5, 1957.

During the initial phase of the questioning Smith gave certain information which proved to be false regarding his activities on the night of the murder and on the morning following. During this phase of the questioning Smith's demeanor was described as "cocky and self-assured."

The investigating officers noted that one of Smith's fingers had an injury of recent origin and observed contusions and lacerations on Smith's knees. Smith gave the officers a contrived story regarding the origin of these injuries.

At approximately 1:00 a.m. Smith was offered coffee and a sandwich. Respondent, accompanied by several investigating officers, left the Mahwah headquarters at 2:00 a.m. in an attempt to verify certain statements made by Smith. The result of this excursion was to cast further doubt on respondent's story.

Upon returning to headquarters, the questioning continued. At approximately 4:00 a.m. Smith and several officers again left headquarters in an attempt to verify his alibi. As in the initial instance, this excursion cast further doubt on the veracity of Smith's statements.

Smith, in the company of one officer, went to a local diner where both had breakfast. After having breakfast Smith was then examined by the county medical examiner. This examination necessitated the removal of Smith's clothing. The doctor examined the injuries to

Smith's knees and finger. Respondent was found to be in good health.

Upon returning to police headquarters Smith's knee injuries were photographed. He was then fingerprinted. Fingernail clippings and scrapings were also taken.

Smith's request for permission to telephone his wife was granted. He told his wife where he was and requested her to contact a certain lawyer.

Smith was then confronted with a pair of pants saturated with blood which had been found discarded near the scene of the murder. He denied that these pants belonged to him. Mrs. Smith was brought to the prosecutor's office. She identified the bloody pair of pants as belonging to her husband.

Shortly before the resumption of the questioning, respondent got out of the chair in which he was sitting in an attempt to leave the prosecutor's office. Acting instinctively, one of the officers restrained him.

At 10:00 a.m. the questioning resumed. The investigating officers had agreed that at some point in the questioning one of them would ask Smith what the victim had done to provoke him. At the outset of this phase of the questioning the discussion ranged from religious backgrounds to a particular homicide where the suspect had cooperated with the police and received a less severe sentence.

Shortly thereafter, one of the officers asked, "What did she do to you?" Smith replied, "She hit me and I hit her a good shot." After this admission, Smith began to cry. Respondent then requested a cigarette and water. Both were provided. Smith then related to the officers many of the events surrounding the murder.

At respondent's request he was allowed to meet with a priest for approximately 45 minutes. Shortly thereafter, Smith met with his wife in the prosecutor's private office.

The investigating officers arranged for a verbatim stenographic record of respondent's statement. Present during this session was a disinterested member of the current petit jury panel. Smith indicated to the officers that he was willing to give the statement voluntarily and under oath. Respondent related essentially the same facts that he had earlier given to the detectives regarding the events surrounding the homicide. A portion of the stenographic statement was taken at the scene of the crime where Smith demonstrated to the officers his actions on the night of the murder. Near the conclusion of the stenographic statement Smith indicated to the investigating officers that he had not been mistreated. Smith further volunteered that the treatment he had received exceeded his expectations.

Respondent was arraigned at approximately 4:00 p.m. March 6th. He was then taken by several of the investigating officers to a restaurant where he had dinner. Following dinner, Smith was committed to the county jail.

On March 8, 1957 respondent was indicted for murder. On March 8, 9, and 11 he was transferred from the county jail to the prosecutor's office where he was examined on each occasion by a different psychiatrist. The examinations were conducted to determine whether respondent was sane. During each of these sessions Smith repeated certain incriminating statements that he had given to the police on March 6. The contents of these admissions were elicited from Smith on cross-examination at his trial, as well as referred to by the prosecutor during his summation to the jury.

On March 11, 1957, Smith was confronted with a transcript of his stenographically recorded statement. Smith was requested to read the transcript, make any necessary corrections, and sign it. Smith read it and acknowledged its accuracy, but refused to sign it under advice of counsel. His acknowledgment of the accuracy of the statement as well as the statement itself were admitted at trial.

The Court of Appeals for the Third Circuit, affirming the District Court's judgment, held that the oral admissions made on the morning of March 6, 1957, as well as the stenographically recorded admissions were coerced and involuntary. The court further found that the acknowledgment of March 11 as to the authenticity of the transcript of March 6 was the "fruit of the prior coercive questioning." Lastly, the court found that the incriminating statements made to the three psychiatrists, which were elicited on cross-examination, were also the fruits of the prior "coercive" events. The court held that the admission of these statements at trial violated the due process clause of the Fourteenth Amendment.[2]

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[2] The District Court found that the following circumstances rendered the admissions involuntary:

> "The absence of Miranda-type warnings; the knowledge on the part of the prosecuting authorities that Smith wanted counsel and Smith's knowledge that his effort to reach an attorney had been frustrated; the fact of continuous custody from 11:30 P.M. on March 5, 1957; the fact of intermittent but substantially uninterrupted incommunicado interrogation for most of the intervening time; the submission to a naked physical examination; the tak-

(*Footnote continued on following page*)

At this juncture, it is significant to note that only two of the four statements found involuntary by the District Court were the subject matter of the evidentiary hearing. In granting respondent an evidentiary hearing, the District Court limited the fact finding to the admissibility of the stenographic transcript of March 6 and the acknowledgment of the authenticity of this transcript on March 11. Nevertheless, the District Court's judgment, affirmed by the Court of Appeals, ruled that the 10:00 a.m. admission as well as the admissions to the three psychiatrists were also inadmissible. This ruling was made in spite of the fact that respondent had not exhausted his state remedies by contesting the admissibility of these statements in the state courts (Pa55).

(*Footnote continued from preceding page*)

ing of hair samples, fingernail pairings and fingerprints; the removal of his clothing and the substitution of prison garb; the forcible physical reaction to Smith's one effort to leave; the confrontation with the bloody pants; the continuation of interrogation after Smith's wife identified the pants as his; the substitution of a new relay of interrogators; Smith's gradual deterioration of spirit from cocky and confident at 11:30 P.M. on March 5, to subdued at 2:30 A.M. on March 6, to very restless and apprehensive and markedly agitated at 7:55 A.M. on March 6, to broken and crying when finally trapped into an incriminating admission after 10:00 A.M.; the interrogators preconceived scheme for trapping Smith into a damaging admission including their appeal to religion, their indication of the certainty of scientific detection; and the suggestion of leniency implicit in the reference to the Lewden case." (Pa41 to 42)

REASONS FOR GRANTING THE WRIT

I. The holding below conflicts with this Court's decisions regarding the admissibility of pre-Miranda confessions.

In resolving the issue of voluntariness in favor of respondent, the courts below have misapplied and misconstrued the decisions of this Court regarding the due process standard of voluntariness. Although the Court of Appeals stated that its affirmance was based on the 1957 standard of voluntariness, in reality the court improperly employed the criteria of voluntariness as it has evolved through 1971 contrary to the doctrine of *Procunier* v. *Atchley,* 400 U. S. 446 (1971). Compounding this error is the application by these courts, *sub silentio,* of the doctrine of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), to a 1957 confession.

The court's resolution of the voluntariness issue in favor of respondent comes after every court which considered the question previously concluded otherwise. The critical facts, as determined by the district court, are essentially the identical facts presented to both the federal and state courts on prior occasions.

In determining whether a confession is voluntary under the due process standard, this Court has considered to be vital such factors as the intellectual capacity and maturity of the suspect, the type and duration of interrogation, the incommunicado nature of interrogation, the availability of food and drink, the physical health of the suspect, and the availability of counsel.[3] In contrast,

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[3] See footnotes 4, 5 and 6 *infra.*

at the time of his interrogation, Edgar Smith was a mature adult, an ex-marine in good physical condition, possessing a superior intellect.* During the investigatory phase of the case Smith was questioned intermittently at a relaxed pace. He was not subjected to protracted incommunicado interrogation. Smith was permitted to converse with his wife by telephone, to meet with a priest for 45 minutes, and later to see and speak with his wife. He was also supplied with food and drink on a regular basis. During Smith's telephone conversation with his wife he requested her to retain the services of a certain attorney. Each of the above factors militates against a conclusion that any statement given by Smith under these circumstances was coerced.

The Court of Appeals, in affirming the District Court's findings, stated that the inculpatory admissions were involuntary under the contemporary case law of 1957. Petitioner does not dispute that 1957 case law should be the court's guide in determining whether respondent's admissions were voluntary. In *Procunier* v. *Atchley, supra,* this Court stated that "the admissibility of respondent's statement as a constitutional matter was governed, therefore, by the contemporary case law elaborating the due process standard of voluntariness." *Id.* 91 S. Ct., at 489.

The Court of Appeals purported to follow this principle, citing *Fikes* v. *Alabama,* 352 U. S. 191 (1957), *Turner* v. *Pennsylvania,* 358 U. S. 62 (1959), *Haley* v. *Ohio,* 332 U. S. 596 (1948), and *Malinski* v. *New York,*

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* Smith's intelligence quotiant reputedly has been measured at 154. (3T. 1305-22 to 26; refers to transcript of hearing before Judge Gibbons).

324 U. S. 401 (1945). It is submitted that these cases do not support the result reached by the court below.[4]

The decisions of this Court purportedly relied upon by the District Court and the Court of Appeals in determining respondent's statements to be inadmissible are inapposite.[5] This Court has never considered a combination of circumstances similar to those now before it.

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[4] *Fikes* v. *Alabama, supra,* concerned the admissibility of a confession of an uneducated Negro of low mentality and questionable mental health. The confession was elicited after a five-day period of incommunicado isolation.

Turner v. *Pennsylvania, supra,* involved the admissibility of a confession extracted from a suspect who had been held incommunicado for five days, and who had been continuously interrogated by relays of police officers day and night until he confessed to the crime.

Haley v. *Ohio, supra,* held as inadmissible a confession extracted from a 15-year-old questioned for five or six hours by relays of police. The determining factor was the youth of the subject.

Malinski v. *New York, supra,* concerned the confession of a suspect held incommunicado for four days in various locations until he confessed. The confession followed continuous questioning.

[5] *Darwin* v. *Connecticut,* 391 U. S. 346 (1968) Confession held involuntary where suspect was held incommunicado for 30 to 48 hours during which his numerous attempts to contact outside world were frustrated. His attorney's numerous attempts to contact the suspect were unavailing.

Clewis v. *Texas,* 386 U. S. 707 (1967), wherein after 38 hours, a suspect with a fifth grade education, with little sleep, little food and physically ill, confessed to the crime in question. Three days later, after more continuous questioning and incommunicado custody, a second statement was coerced.

(Footnote continued on following page)

(*Footnote continued from preceding page*)

Davis v. *North Carolina*, 384 U. S. 737 (1966) Admissions were elicited from an impoverished Negro of low mentality having only a third or fourth grade education, after prolonged detention in solitary confinement for a period of 16 days. The suspect was held incommunicado during this period of time.

Haynes v. *Washington*, 373 U. S. 503 (1963), The suspect was held incommunicado for sixteen hours. He repeatedly requested to see his wife or his lawyer, which requests were denied. The suspect was told that if he confessed he could then see his wife. The police threatened to keep the suspect incommunicado until he confessed.

Lynumn v. *Illinois*, 372 U. S. 528 (1963), Police obtained a confession by threats that if the suspect did not cooperate, she would be deprived of state financial assistance for her children, her children would be taken from her and she would never see them again.

Culombe v. *Connecticut*, 367 U .S. 568 (1961) Confession held involuntary where mentally defective suspect was questioned for four days.

Reck v. *Pate*, 367 U. S. 443 (1961) Confession held involuntary where suspect was mentally defective, held nearly eight days during which he was subjected to extensive interrogation and provided with little food.

Blackburn v. *Alabama*, 361 U. S. 199 (1959) Extraction of a confession from an insane suspect after an eight or nine hour incommunicado interrogation.

Spano v. *New York*, 360 U. S. 315 (1959), Confession held involuntary where defendant was questioned continuously for eight hours, during which time he was refused permission to contact the attorney he had already retained and where a friend was utilized by the police to make false representations in order to play on sympathy to induce a confession.

(*Footnote continued on following page*)

An examination of the contemporary case law of 1957[5] compels the conclusion that the admissions made by Edgar Smith were the product of a free and unconstrained will. The critical question to be discerned from this Court's pronouncements, be it 1957 or 1971, is whether the will

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(Footnote continued from preceding page)

Payne v. *Arkansas*, 356 U. S. 560 (1958), Confession held involuntary where accused, a mentally dull Negro youth of 19 with a fifth grade education, confessed after being held incommunicado for three days during which time little food was provided.

Leyra v. *Denno*, 347 U. S. 556 (1954), Confession held involuntary where the suspect was induced to confess by a state-employed psychiatrist through a ruse followed by intensive police questioning.

Harris v. *South Carolina*, 338 U. S. 68 (1949), Confession held involuntary where an illiterate Negro was held incommunicado from Sunday to Wednesday and questioned continuously.

Watts v. *Indiana*, 338 U. S. 49 (1949). The suspect was arrested wholly on suspicion and held incommunicado from Wednesday to the following Tuesday until he confessed. He was held in solitary confinement with no place to sit or sleep, except the floor.

Chambers v. *Florida*, 309 U. S. 227 (1940), The suspects, ignorant tenant-farmers, were held in incommunicado custody for a period of a week under circumstances "calculated to break the strongest nerves and stoutest resistance," Id. 309 U. S., at 238-39.

[6] In this regard, the following holdings of this Court compel a finding that Smith's admissions were not coerced or the result of a will overborne. See *Cicenia* v. *Lagay*, 357 U. S. 504 (1958); *Crooker* v. *California*, 357 U. S. 433 (1958); *Stein* v. *New York*, 346 U. S. 156 (1953); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Gallegos* v. *Nebraska*, 342 U. S. 55 (1951); *Lyons* v. *Oklahoma*, 322 U. S. 596 (1943); *Lisenba* v. *California*, 314 U. S. 219 (1941).

of the accused has been overborne.[7] Balancing the suspect's individual rights with those of the public, it cannot be said that the conduct of the authorities transcended fundamental fairness. Smith admitted that the treatment he received was better than he had expected.

In the final analysis the conclusion is inescapable that the result reached by the courts below hinges upon a retroactive application of *Miranda* v. *Arizona, supra,* in spite of the court's disclaimer. Only in light of this reliance on *Miranda* is the final disposition understandable. At eight points during the course of the District Court's opinion, pointed references are made to the lack of Miranda warnings.[8] Although petitioner recognizes that the absence of warnings is relevant to a consideration of voluntariness, it is not determinative, *Haynes* v. *Washington,* 373 U. S. 503 (1963). Examining the totality of circumstances, the voluntariness of Smith's admissions is apparent.

Petitioner respectfully urges that this Court take this opportunity to review the decision of the Court of Appeals. It is submitted that this decision is in direct conflict with the applicable decisions of this Court regarding the voluntariness of confessions.

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[7] This Court recently reiterated the test to be applied in determining whether a confession is voluntary and therefore admissible. "The question was whether the will of the defendant had been overborne so that the statement was not his free and voluntary act, and that question was to be resolved in light of the totality of the circumstances. *Procunier* v. *Atchley, supra,* 91 S. Ct., at 489.

[8] Pa14, 18, 20, 26, 31, 39, 41.

II. An evidentiary hearing should not have been granted.

The District Court failed to apply the pertinent holdings of this Court regarding the standards governing the granting of an evidentiary hearing. That court held respondent was entitled to a evidentiary hearing on the issue of the voluntariness of his statements because "the material facts were not adequately developed at the state court hearing." *Townsend* v. *Sain,* 372 U. S. 293 (1963); 28 U.S.C. §2254(d)(3).

In *United States ex rel. Smith* v. *Yeager,* 383 U. S. 122 (1968), this Court determined that respondent had not waived his rights to an evidentiary hearing due to the waiver thereof by his attorney in the 1961 habeas proceedings. However, this Court expressly declined to pass on whether respondent was in fact entitled to such a hearing. The matter was remanded to the district court for that determination. In *Procunier* v. *Atchley, supra,* this Court stated:

> ". . . but those decisions [referring especially to *Townsend* v. *Sain, supra*] did not establish that an applicant for federal habeas corpus, is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events, if true, would require the conclusion that his confession was involuntary. Thus, in *Townsend* v. *Sain, supra,* we did not reach the question whether a hearing was required until we had determined, as a threshold matter, that the application for habeas corpus alleged facts

> which, if true, would establish that the petitioner had been deprived of constitutional rights by use of an involuntary confession." *Id.* 91 S. Ct., at 488.

In the instant case, the initial opinion of the District Court on remand is barren of any determination that the alleged facts, if true, would establish that Smith had been deprived of his constitutional rights. The practice of granting evidentiary hearings without making this threshold determination, if allowed to continue, could flood the federal courts with applications for such hearings.

Furthermore, in this case an evidentiary hearing has been granted in spite of the fact that neither of the criteria set forth in *Townsend* v. *Sain*, *supra* was satisfied. In *Townsend*, this Court stated, "If for any reason not attributable to the [1] inexcusable neglect of petitioner . . . [2] evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing a federal hearing is compelled." *Id.* 372 U. S., at 317.

The initial question to be answered is whether an evidentiary hearing should be granted when the hearing before the state court regarding the issue of voluntariness was adequate. Respondent has repeatedly attacked the admission of his statement at his trial. Prior to the District Court's grant of an evidentiary hearing, other courts, both state and federal, have unfailingly held that the voluntariness hearing at the trial was adequate. *E.g.*:

> "It is very plain that the trial judge under the governing law of New Jersey at that time held an adequate preliminary hearing as to the voluntariness of the statement. It is also very plain that his decision that the statement was in the nature

> of a confession and it was voluntary, was fully supported by the evidence." *U. S. ex rel. Smith* v. *New Jersey,* 322 F. 2d 810, 817 (3rd Cir. 1963), *cert.* denied 376 U. S. 928 (1964).

While the Court of Appeals in 1963 found the state court record to be adequate, the District Court in 1970 determined that this same record is now inadequate. However respondent, utilizing his resourcefulness and creativity, was able to embellish the factual allegations previously presented to the federal courts. Respondent was granted an evidentiary hearing on this basis. Petitioner submits that this Court's holding in *Townsend* has been distorted in the instant case to such an extent that even though the state court record was adequate, an evidentiary hearing can be granted solely on the basis of the habeas applicant's ability to conjure up new factual allegations. Cf. *Sanders* v. *United States,* 373 U. S. 1 (1963); 28 U.S.C. 2244 (a).

Even where there is an inadequacy in the record, an evidentiary hearing is not permissible where by choice or neglect the petitioner is responsible for that inadequacy. As noted above, this Court has specifically foreclosed habeas applicants from seeking an evidentiary hearing where the inadequacy of the record resulted from their own inexcusable neglect. The intent of *Townsend* was to afford hearings to those petitioners who could not knowingly or reasonably have introduced evidence necessary to complete the record. A rehearing is not warranted when facts known to a petitioner at the time of the trial are consciously withheld from the record of the trial proceedings. *Cf. Wong Doo* v. *United States,* 265 U. S. 239 (1924).

Smith had every opportunity to avail himself of as complete an evidentiary hearing as he desired. The State provided respondent with a forum for such a hearing. This failure to utilize such opportunity must be deemed a waiver for the purposes of federal habeas corpus. *Henry* v. *Mississippi*, 379 U. S. 443 (1964); *Fay* v. *Noia*, 372 U. S. 391, 438 (1962).[9]

In *Townsend* this Court stated that "the too promiscuous grant of evidentiary hearings on habeas could both swamp the dockets of the district courts and cause acute and unnecessary friction with state organs of criminal justice." *Id.* 372 U. S., at 329. Petitioner submits that the spectre invoked in this Court's admonition in *Townsend* became a reality when the District Court granted respondent an evidentiary hearing.

III. The respondent's failure to exhaust his state remedies with respect to the initial oral admission at 10:00 A.M., as well as the admissions to the three psychiatrists is a bar to a consideration on the merits.

The Court of Appeals affirmed the District Court's findings that respondent's admission made at 10:00 A.M. March 6 and the admissions made to the three psychiatrists on March 8, 9 and 11 were involuntary, and that

[9] At trial defendant did not forcefully dispute the voluntariness of his admissions. Defense counsel had openly admitted their voluntariness, but seized the opportunity for a hearing outside the presence of the jury to contest the admissibility of the statements as not being evidential under New Jersey law. In spite of defense counsel's willingness to concede voluntariness, the trial court held a voir dire after which the court determined Smith's admissions were voluntary.

their admission into evidence constituted a violation of due process. Consideration of the voluntariness of these admissions is in conflict with decisions of this Court regarding the proper scope of federal habeas review of state court convictions.

The opinion of the District Court dated November 30, 1970, sets forth the issues to be decided at the evidentiary hearing (Pa47 to 55). The hearing court was to consider the admissibility of the stenographic admission of March 6 and the acknowledgment admission of March 11. The admissions to the psychiatrists and the oral admissions of March 6 were not deliniated. Nevertheless, the hearing court rendered an opinion finding these admissions involuntary and inadmissible.

Prior to the consideration of these admissions by the District Court, the issue of their involuntariness had never been raised or considered in the New Jersey courts. The District Court passed on the voluntariness of these admissions in spite of the fact that respondent had not exhausted his state remedies. Thus, entertainment of these issues by the District Court and Court of Appeals appears to conflict with this Court's holdings in *Jackson* v. *Denno*, 378 U. S. 368 (1964), *Fay* v. *Noia*, 372 U. S. 391 (1963), *Brown* v. *Allen*, 344 U. S. 443 (1953), and 28 *U.S.C.* §2254 (b).

The exceptional circumstances which may permit deviation from the exhaustion doctrine are not present in the case *sub judice*.[10] Nothing prevented respondent from

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[10] Admittedly, the requirement that a habeas applicant exhaust his state court remedies is a principle of comity and does not rise to jurisdictional proportions. However, this principle of comity will not give way unless manifest injustice will result. See *Fay* v. *Noia*, *supra* at 420-441; and *Ex Parte Hawk*, 321 U. S. 114, 117 (1944).

raising the heretofore unchallenged admissions in the state courts, rather than initially raising them in his petition for habeas corpus. This is not a case where the doors of the state court would be closed to respondent, nor has the state already denied relief on the precise issues now being raised. See *Singer* v. *Meyers,* 392 U. S. 647 (1968), *Roberts* v. *LaVallee,* 389 U. S. 40 (1967), *Gockley* v. *Meyers,* 411 F. 2d 216 (3rd Cir. 1969), cert. denied 396 U. S. 847 (1969). In each of the above cited cases, unusual circumstances such as the state court's refusal to consider petitioner's allegations or the obvious futility of making such a request, prompted the courts to waive the exhaustion requirement.

The District Court's sanction of Smith's bypass of the state court remedies is in diametric opposition to this Court's holdings in *Jackson* v. *Denno, supra.* In *Jackson,* this Court stated that where one "has not been given an adequate hearing upon the voluntariness of his confession, he must be given one." *Id.* 378 U. S., at 393. Such hearing "should occur initially in the state courts rather than in the federal habeas corpus court." *Id.* See also *Rogers* v. *Richmond,* 365 U. S. 534, 547, 548 (1961).

The principle of 28 U.S.C. §2254 that "a writ of habeas corpus shall not be granted unless the applicant has exhausted his state remedies" was disregarded by the courts below. It is respectfully urged that this departure from well-established principles of comity would by itself warrant the grant of certiorari in this case.

IV. The District Court was obliged to dismiss respondent's petition at the end of the evidentiary hearing.

The evidentiary hearing disclosed no new facts critical to the issue of voluntariness. That being so, the District Court was obliged to dismiss respondent's petition on the grounds that the evidentiary hearing was improvidently granted and that the District Court was bound by a prior decision on the merits by the Third Circuit.

This conclusion is most forcibly brought home by an examination of Judge Ganey's dissent from the Third Circuit's dismissal of Smith's prior petition in 1963 (*Smith* v. *New Jersey*, 322 F. 2d 810, 818 (3rd Cir. 1963) cert. denied 376 U. S. 928 (1964)) wherein Judge Ganey catalogued the critical facts then before the Court in support of his view that the statements in question were involuntary:

> "Suffice it to say the stark facts are that from 8 A.M. on the morning of March 5, 1957, until 3:45 P.M. on March 6, 1957—almost 32 hours—the appellant had no sleep with the exception of a couple of hours before he was taken from his bed and placed in custody at 11:30 P.M. on March 5; that he was interrogated in relays by prosecutors and their aides, local police and county detectives, as many as seven being present at one time, all through the night, relieved only by his being taken to various places in freezing weather with only a T-shirt on to check his alibi; that he was given a light breakfast, stripped and examined by a doctor and questioned again repeatedly until 10 A.M. on March 6, when he broke down completely and cried and asked for a Catholic priest. At this hour, the police

had in their possession, as a result of their investigation, the car that the appellant used the night of the crime, in which was a blood-stained mat, his shoes and socks, all stained with blood, and an admission from him that he was at the scene of the crime with the decedent and had given her a 'good shot.' From this point on, there was no need of any exploratory or investigative work, nor, in fact, was any made, and by every standard of fairness, the appellant should have been arraigned. However, neither advising him that he had the right to remain silent nor that he had the right to counsel, they proceeded for two hours to extract a statement from him of the details of the crime, and, from his own lips, to brand himself with guilt. An examination of the record discloses no reason or motive whatsoever consonant with recognized police work for the detection of crime in the securance of the confession except, as adverted to, to compel admission of his guilt." *Id.* at 818.

The District Court's opinion in this case, adopted by the Circuit Court, might well have been a paraphrase of Judge Ganey's earlier exposition of the operative facts. In short, the evidentiary hearing did not adduce any facts critical to the question of voluntariness not previously before the courts. That being the case, under the ineluctable corollary of the doctrines espoused in *Townsend* v. *Sain, supra,* and *Procunier* v. *Atchley, supra,* the District Court's rejection of the Circuit Court's previous determination that Smith's statements were involuntary is without authority.

The District Court found that respondent's arraignment was delayed for the purpose of obtaining sufficient evi-

dence to insure a conviction for first degree murder even though the prosecution had "sufficient information to charge Smith with murder and to have him taken before a committing magistrate" at 10 a.m.[11] The District Court also found that no Miranda-type warnings were given, that Smith wanted counsel and that his attempt to reach an attorney had been frustrated; that respondent was in continuous custody from 11:30 P.M. on March 5 until the admissions were made the following day; that respondent was subjected to intermittent "but substantially uninterrupted, incommunicado interrogation for most of the intervening time"; that he was submitted to a naked physical examination; that samples were taken from his hair and fingernails; that his civilian clothing had been substituted for prison garb; that Smith had been forcibly restrained upon his one effort to leave the prosecutor's office; that he was confronted with the bloody pants; that interrogation continued after Smith's wife identified those pants; that he was subjected to relays of interrogators; that respondent's spirit deteriorated from one of cockiness to broken and crying after lapsing into an incriminating admission; that the interrogators pursued a planned method of interrogation; and that they suggested the possibility of leniency (Pa41-Pa42).

As is evident from the majority opinion of the Circuit Court as well as Judge Ganey's dissent, each of the foregoing factors had either been dealt with directly or referred to in previous adjudications of the voluntariness question. The only factors not specifically discussed in the Third Circuit's earlier opinion were the frustration

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[11] Pa21; see also N.J. R.R. 3:2-3(a) (1953) as amended R. 3:4-1 (1969) as interpreted by *State* v. *Taylor*, 46 N. J. 316, 328, cert. denied 385 U. S. 855 (1966).

in the attempt to obtain counsel, the substitution of civilian clothing in favor of prison garb, the forcible restraint of Smith in his effort to leave, and the preconceived plan of interrogation.

Petitioners urges that none of these factors alone nor any combination of these elements could have justified the District Court's rejection of the Third Circuit's earlier determination. In view of the fact that Smith was the focal point of the investigation it was clearly reasonable to prevent Smith's departure. Only upon seeing what appeared to be a bloodstain on respondent's T-shirt was his clothing removed to facilitate further examination. Although methods of interrogation including the one utilized in this case were discussed in *Miranda* v. *Arizona*, they were not collectively ruled improper; this Court viewed the necessity of the Miranda-type warnings in light of the recognized methods of police interrogation. Finally, the District Court's conclusion that Smith's efforts to reach an attorney were frustrated by the authorities appears to be unfounded. Edgar Smith was permitted to use the telephone, to speak with his wife, and in fact requested her to retain the services of a particular attorney. That she did not fulfill her designated task is not the fault of the State.

Inasmuch as no new critical facts were developed by the District Court, that court was bound by the prior determination of the Third Circuit on virtually the identical facts. See 28 U.S.C. §2244(a). Moreover, in light of this, it must be concluded that the fact-finding procedure employed by the State was adequate to afford a full and fair hearing. That being the case, respondent's petition should have been dismissed and the hearing terminated of as being improvidently granted.

Thus, it appears that this federal intervention in the adminstration of New Jersey criminal justice was unwarranted, and that "an exercise of this court's power of supervision" over the federal courts is appropriate at this time. *Sup. Ct. Rule* 19(b).

V. The statements made to the psychiatrists were admissible at trial under the due process standard.

In spite of the fact that the voluntariness of the admissions to the three psychiatrists was not properly before the District Court, that court, affirmed by the Court of Appeals, found that these admissions must be excluded. The court held that the admission of these incriminating statements was barred by the circumstances under which they were obtained, relying on *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964), *Adamson* v. *California*, 332 U. S. 46 (1947), and *Twining* v. *New Jersey*, 211 U. S. 78 (1908). The court further found that the statements to the psychiatrists were inadmissible in that they resulted from a "chain of coercive events" directly related to the admissions elicited on March 6.

Twining, *Adamson* and *Murphy* do not support the conclusions of the Court of Appeals and District Court. Indeed, both *Twining* and *Adamson* lend cogent support to petitioner's position. In *Twining* and *Adamson*, this Court simply held that the Fifth Amendment's self-incrimination clause was not applicable to the states through the Fourteenth Amendment. Nothing in these cases suggests that the utilization of the admissions to the psychiatrists in any way violated the due process clause of the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U. S. 1 (1964) applied the Fifth Amendment privilege to the states through the Fourteenth Amendment's due

process clause. *Murphy, supra,* its companion case, although articulating an exclusionary rule for service in another Fifth Amendment context does not appear to be directly pertinent to this case. Moreover, *Murphy* and *Malloy* have not been held to be retroactive. Cf. *Tehan* v. *U. S. ex rel. Shott,* 382 U. S. 406 (1966).

The statements made to the psychiatrists were not compelled. In every one of the above-cited cases the defendant was placed by the state on the horns of a cruel dilemma: if he spoke he would incriminate himself, but if he resisted the compulsion to speak another untoward result would follow. The facts surrounding the admissions to the three psychiatrists are conspicuously free of any compulsion. Respondent was not forced to submit to the psychiatric examination, nor was he compelled to disclose anything which might incriminate him in these examinations. Indeed, respondent was warned that anything he said during the examinations could be used against him. Moreover, respondent's attorney readily consented to the psychiatric test.

The court below cites *Harrison* v. *United States,* 392 U. S. 219 (1968) in support of the conclusion that the admissions resulted from a chain of coercive events. *Harrison* is a case where the admission of three coerced confessions against defendant at trial clearly induced him to change his previously stated intention and testify in his own defense. The conviction was reversed. At the retrial defendant's testimony from the prior trial was read into the record.

The factual distinctions between *Harrison* and *Smith* are crucial. Smith's statements to the doctors were intended to be self-serving: (1) as a basis for a possible defense of insanity or (2) as a basis for mitigation of

his crime. It is arguable that "but for" the prior statements he would not have had to talk with the doctors. Such a "but for" argument was specifically rejected in *Wong Sun* v. *United States*, 371 U. S. 471 (1963). "Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which the distant objection is made has been come at by exploitation of that illegality or instead by means of sufficiently distinguishable to be purged of the primary taint." *Id.* 371 U. S., at 488. The psychiatric examinations were conducted two, three and five days subsequent to the initial admissions and were sufficiently distinguishable from the admissions of March 6 to be purged of any alleged taint.

Finally, it is significant to note that the admissions to the psychiatrists were elicited from respondent on cross-examination to impeach his credibility. In this regard, *Harris* v. *New York*, —— U. S. ——, 91 S. Ct. 643 (1971), is controlling. *Harris* held that an incriminating statement, inadmissible against a defendant in the prosecution's direct case because of failure to comply with the Miranda rule, may be used to attack the credibility of defendant's trial testimony on cross-examination. In an illuminating footnote, this Court set forth a hypothetical which bears a strong resemblance to the instant case:

> "If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a 'fruit' of his confession free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be

totally irrelevant. We reject such an extravagent extension of the Constitution." *Id.* 91 S. Ct., at 646, n. 2.

It is respectfully submitted that the decision to exclude the admissions to the psychiatrists is in conflict with the applicable decisions of this Court.

VI. The systematic relitigation in the federal courts of issues already resolved constitutes an abuse of the writ of habeas corpus.

An attempt to trace the history of the litigation in this case is to be caught in a legal labyrinth. Respondent has repeatedly confronted both the state and federal courts with appeals, post-conviction relief petitions, and writs of habeas corpus. Utilization of the courts in such a manner constitutes an abuse of the habeas remedy. Respondent has made application for habeas relief in the district courts on certain grounds while holding others in abeyance. Another tactic of respondent has been the raising of issues previously resolved combined with new allegations of fact. Respondent's actions, which are not unlike those of many state prisoners seeking federal collateral relief, contributes in large measure to the serious strain on the energies of our courts.[12] Petitioner respec-

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[12] The backlog in the federal courts due to the avalanche of habeas corpus petitions submitted solely as a routine vehicle for review by the federal courts of state court criminal judgments was highlighted in DOUB, *The Case Against Modern Federal Habeas Corpus*, 57 *A.B.A.J. 323 (1971)*. The article noted that the number of state prisoner habeas corpus petitions have increased from 89 in 1940 to 12,000 in 1969. In commenting on this astounding growth the author stated:

(*Footnote continued on following page*)

fully urges that this Court exercise its power of supervision to halt the continued abuse of the Great Writ to facilitate the administration of criminal justice.

Respondent has repeatedly urged that his admissions were involuntary.[13] Respondent's applications for habeas corpus and post-conviction relief were considered and rejected on their merits. Yet respondent has continued to pursue this issue. Respondent's tactic has been to infuse novelty into his previously denied application for habeas, by merely conjuring up new factual assertions. Reserving factual allegations previously available to support later petitions for habeas corpus must be discouraged. See *Wong Doo* v. *United States*, 265 U. S. 239 (1924). Further, to relitigate grounds already disposed of is a perversion of the writ. Cf. *Sanders* v. *United States*, 373 U. S. 1 (1962); 28 U.S.C. §2244(a).

(*Footnote continued from preceding page*)

> "Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, resifting, examining, and re-examining of state criminal judgments for possible constitutional error. The protection of constitutional rights is the cornerstone of our system of criminal justice, but are the state judicial systems so weak, so inadequate as to require discarding all the traditional principles of *res judicata* and estoppel? No other nation in the world has so little confidence in its judicial systems as to tolerate these collateral attacks on criminal court judgments." Id. at 326.

[13] See petitioner's synopsis of the history of the litigation instituted by respondent in the state and federal courts contained note 1, *supra*.

In *Nelson* v. *O'Neil*, 401 U. S. ——, 91 S. Ct. 1723 (1971), Mr. Justice Harlan, in a concurring opinion, discussed the advisability of entertaining habeas corpus petitions on issues already resolved. Justice Harlan stated:

> "No one, not criminal defendants, not the judicial system, not society as a whole, is benefited by a judgment providing that a man shall tentatively to go jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to free litigation on issues already resolved." *Id.*, 91 S. Ct., at 1728.

Justice Harlan further points out that the energies of the federal courts have been drained and expended for no good purpose in entertaining habeas corpus petitions on their merits when the merits of the case have already been litigated.

Recently, the Honorable Frederick Lacey, Judge of the United States District Court, mirrored the increasing concern in this district regarding the growing abuse of the habeas remedy. In *United States ex rel. Seaman* v. *Cryan*, —— F. Supp. ——, (Civ. No. 1045-71, D. N. J., Aug. 5, 1971), Judge Lacey stated:

> "'Preliminarily, there is something that needs to be said, for the courts, for litigants, and for the people of this country who are distressed at the inability of our courts to discharge their business. This proceeding, commenced just a few days after the New Jersey Supreme Court denial of certification, dramatizes the recurrent utilization of federal habeas corpus for what is becoming, practically speaking, one more appeal. . . .'
>
> "This court too is concerned at the developing trend among able and assidious counsel to tack on

> to their state court appeals as a matter of procedural routine, federal habeas corpus proceedings. Though it may be futile or ineffectual for a district judge to proclaim it, this is, it would seem, a perversion of the Great Writ . . .
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> * * *
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> "My cavil is aimed at the distortion of the writ, a distortion now so institutionalized that legal representation which does not routinely travel the course of habeas corpus, after unhappy state appellate experience is becoming a rarity. Legislative relief is sorely needed!" *Id.*, slip opinion at 7-8.[14]

Judge Lacey's comments have a special relevancy to this case. It cannot be doubted that the litigation initiated by respondent during the past fourteen years has been an attempt to have "one more appeal." The history of this litigation in the courts clearly dramatizes the need "for an exercise of this court's power of supervision" to stem the rising tide of the unjustified use of the Great Writ.

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[14] Judge Lacey further amplified his concern for the threatened inundation of the federal court system. In *United States ex rel. Troy Victor* v. *Yaeger*, —— F. Supp. ——, (Civ. No. 742-71, D. N. J., Aug. 24, 1971) Judge Lacey stated:

> "A dire prediction, based on the current substantial trend, can be made; the time is not far distant when virtually *every* convicted defendant will seek further 'appellate' review by habeas corpus immediately after state appellate affirmance of his conviction.
>
> Even partial fulfillment of this prophecy will cripple the district court of this district. The intrusion of these matters even now consumes a substantial part of the courts' available time." *Id.*, Slip. Op. p. 2.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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APPENDIX A

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1490

UNITED STATES OF AMERICA
ex rel. EDGAR H. SMITH,

vs.

HOWARD YEAGER, Warden, New Jersey
State Prison, Trenton,

Appellant.

(D. C. Civil Action No. 766-65)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ..... DISTRICT OF NEW JERSEY

Present: GANEY, VAN DUSEN and ALDISERT,
Circuit Judges

Appendix A

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 13, 1971, as amended by order filed June 8, 1971, be, and the same is hereby affirmed, subject however to the previous order of this Court, filed June 9, 1971, which vacated paragraphs 2 through 5 inclusive of the June 8, 1971 District Court order. This action is without prejudice to relator's right to apply for release on bail to the state judiciary under appropriate New Jersey law. N.J.S.A., Const. Art. 1, Section 11. Costs taxed against appellant.

ATTEST:

THOMAS F. QUINN
Clerk

August 2, 1971.

APPENDIX B

Opinion of the Court of Appeals

(Filed August 2, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1490

UNITED STATES OF AMERICA
ex rel. EDGAR H. SMITH,

vs.

HOWARD YEAGER, Warden, New Jersey
State Prison, Trenton,

Appellant.

(D. C. Civil Action No. 766-65)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued July 14, 1971

Before GANEY, VAN DUSEN and ALDISERT,
Circuit Judges

Appendix B

PER CURIAM:

This appeal by the state of New Jersey from the grant of a writ of habeas corpus presents a pre-*Miranda* question whether inculpatory statements of Edgar H. Smith were the voluntary product of a free and unconstrained will.

Following an evidentiary hearing after remand by the United States Supreme Court,[1] the district court concluded that the "admissions made to detectives Spahr and DeLisle on the morning of March 6, 1957, were the result of a culmination of coercive circumstances which made those admissions involuntary under federal constitutional standards. . . . The Ehrenbeck transcript . . . [and] [t]he admissions made by Smith on the afternoon of March 6, 1957, at the Prosecutor's office, at the murder scene, and at the trailer, were all the results of coercion, and their admission at the trial violated the due process clause of the Fourteenth Amendment," —— F. Supp. ——, —— (D. N. J. 1971) (slip opinion at 38-39). We agree.

We hold that there was sufficient evidence adduced at the hearing to support the district court's ultimate findings, considering "the totality of circumstances" under the contemporary case law of 1957 elaborating the due proc-

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[1] Smith v. Yeager, 393 U. S. 122 (1968). See also United States ex rel. Smith v. Yeager, 395 F. 2d 245 (3rd Cir. 1968); 322 F. 2d 810 (3rd Cir. 1963); State v. Smith, 27 N. J. 433, 142 A. 2d 890 (1958); State v. Smith, 29 N. J. 561, 150 A. 2d 769, *cert. denied* 361 U. S. 861 (1959); United States ex rel. Smith v. New Jersey, 201 F. Supp. 72 (D. N. J.), *affirmed* 322 F. 2d 810 (3rd Cir. 1962), *cert. denied* 376 U. S. 928 (1964); State v. Smith, 443 N. J. 67, 202 A. 2d 69 (1964), *cert. denied* 379 U. S. 1005, *rehearing denied* 380 U. S. 938 (1965).

ess standard of voluntariness. *Fikes* v. *Alabama*, 352 U. S. 191 (1957); *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949); *Haley* v. *Ohio*, 332 U. S. 596 (1948); *Malinski* v. *New York*, 324 U. S. 401 (1945).

Additionally, upon review of the record, including the testimony of the psychiatrists, referred to in the district court's opinion, —— F. Supp. at ——, —— (slip opinion at 28-31, 40-41), we have concluded that the court did not err in ruling that relator's statements to these physicians were inadmissible as substantive evidence of guilt.

We have considered all of the contentions presented by able counsel for appellant by brief and oral argument. Our own independent review of the evidence does not persuade us that the district court made findings of historical facts which were clearly erroneous or erred in its ultimate conclusions.

For the foregoing reasons, and for the reasons set forth by the district court supporting its conclusion of coercion, —— F. Supp. at ——, —— (slip opinion at 1-28, 34-39), the judgment of the district court[2] will be affirmed.

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[2] The original order of May 13, 1971, directed that the writ of habeas corpus would issue unless the state

> shall grant to the petitioner Edgar Smith a new trial on the indictment charging him with the murder of Victoria Zielinski, at which none of the admissions made by him on the morning of March 6, 1957, to Detectives Spahr and DeLisle, the admissions in the Ehrenbeck transcript, the "acknowledgement" of that transcript made to Detective DeLisle on March 11, 1957, or the admissions made to Drs. Collins, Spradley and Zigarelli in March of 1957 shall be admitted in evidence.

(Footnote continued on following page)

subject however to the previous order of this Court, filed June 9, 1971, which vacated paragraphs 2 through 5 inclusive of the June 8, 1971 District Court order. This action is without prejudice to relator's right to apply for release on bail to the state judiciary under appropriate New Jersey law, N.J.S.A. Const. Art. 1, §11. The mandate shall issue in one week.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(*Footnote continued from preceding page*)

The amended order of June 8, 1971, provides, inter alia:

> The order of this court filed May 13, 1971, hereby is amended to provide that the writ of habeas corpus will issue unless within sixty days of the date of final disposition of the appeal of this matter the State of New Jersey shall grant to the petitioner a new trial on the indictment.

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 766-65

UNITED STATES OF AMERICA
ex. rel. EDGAR H. SMITH,

vs.

HOWARD YEAGER, Warden, New Jersey
State Prison, Trenton.

By GIBBONS, Circuit Judge*

Petitioner Edgar Smith is before the court seeking a writ of habeas corpus. His petition was filed in 1965. He is confined in the New Jersey State Prison at Trenton awaiting the execution of a death sentence imposed by the Bergen County Court on June 4, 1957, after a jury trial for murder. Since that time petitioner has sought

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* Sitting in the United States District Court by designation.

unsuccessfully to have the conviction set aside.[1] Heretofore this court, without an evidentiary hearing on the allegations of the petition, relying on the contents of the state court trial record, declined to issue the writ. The Third Circuit Court of Appeals affirmed, holding that petitioner's attorney had waived a federal evidentiary hearing. *United States ex rel. Smith* v. *Yeager*, 395 F. 2d 245 (3 Cir. 1968). The Supreme Court reversed. *Smith* v. *Yeager*, 393 U. S. 122 (1968). The case was then remanded to this court for reconsideration of petitioner's request for such a hearing. Following the remand petitioner's attorney, relying on *Greenwald* v. *Wisconsin*, 390 U. S. 519 (1968), urged that even on the state court record the totality of circumstances surrounding the taking of a statement by petitioner used in evidence against him

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[1] Petitioner's conviction was affirmed by the Supreme Court of New Jersey. *State* v. *Smith*, 27 N. J. 433, 142 A. 2d 890 (1958). A petition for habeas corpus was subsequently dismissed by the United States District Court for failure to exhaust state remedies. A motion for a new trial chiefly on the ground of newly discovered evidence was denied, and the denial affirmed by the Supreme Court of New Jersey. *State* v. *Smith*, 29 N. J. 561, 150 A. 2d 769 (1959), *cert. denied*, 361 U. S. 861 (1959). Habeas corpus was again sought and denied in the district court. *United States ex rel. Smith* v. *New Jersey*, 201 F. Supp. 272 (D. N. J. 1962), *aff'd*, 322 F. 2d 810 (3d Cir. 1962), *cert. denied*, 376 U. S. 928 (1964). A Petition for Post-Conviction Relief was denied by the Bergen County Court on April 17, 1964 and that denial was affirmed by the New Jersey Supreme Court. *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669 (1964), *cert. denied*, 379 U. S. 1005, *reh. denied*, 380 U. S. 938 (1965). A subsequent application for post-conviction relief was denied by the Bergen County Court on March 29, 1965, and leave to appeal was denied by the New Jersey Supreme Court on April 13, 1965. A Petition for Reconsideration was denied on June 22, 1965.

at the trial compelled the issuance of the writ. On August 3, 1970, this court ruled that it was bound by a prior ruling of the Third Circuit[2] upholding the conclusions of voluntariness based on the state court record.

That state court trial was the only previous opportunity petitioner had to present evidence on his Fifth Amendment claim. On November 30, 1970, this court ruled that evidence crucial to the adequate consideration of that claim was not fully developed in that record, and that an evidentiary hearing must be held. 28 U.S.C. §2254(d)-(3); *Townsend* v. *Sain*, 372 U. S. 294, 312 (1963). The November 30, 1970, opinion also delimited the scope of the factual issues to be determined. At issue is the voluntariness under federal constitutional standards of all admissions by petitioner which were used against him in the course of his state court murder trial. These admissions may be divided for purposes of discussion into the following categories:

1. Verbal admissions made by petitioner while in the company of various police officials operating at and out of the police headquarters, Mahwah, New Jersey, between the time he was taken into custody at Ridgewood, New Jersey at about 11:30 p.m. on March 5, 1957, and the time he was taken to the office of the Bergen County Prosecutor in Hackensack, New Jersey, at about 8:30 a.m. on March 6, 1957. Various police officers testified at the trial to such admissions.

2. Verbal admissions made during petitioner's interrogation at the Prosecutor's office on the morning

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[2] 322 F. 2d 810 (3d Cir. 1963). See note 1 supra.

of March 6, 1957. Detectives Charles DeLisle and Walter Spahr testified at the trial to such admissions.

3. Verbal admissions made first at the Prosecutor's office and thereafter at and around the scene of the homicide on the afternoon of March 6, 1957, which admissions were in the form of answers in an interrogation conducted by the First Assistant Prosecutor of Bergen County, Fred Galda. These admissions were recorded by a court reporter, were transcribed, and the transcript was read into evidence at the trial.

4. A verbal admission made by petitioner to Detective DeLisle in the Bergen County jail on March 11, 1957, with respect to the accuracy of the transcript of the interrogation on the afternoon of March 6, 1957. Detective DeLisle testified at the trial to such an admission.

5. Verbal admissions made to three psychiatrists, Drs. Zigarelli, Spradley, and Collins, during the course of their separate examinations of the petitioner. These examinations were made for the purpose of determining petitioner's sanity. The admissions were referred to during the cross-examination of petitioner at the trial and in the State's closing argument to the jury as tending to verify the admissions of March 6, 1957.

Petitioner contends that each of the separate categories of admissions was obtained in violation of his privilege against self-incrimination guaranteed by the Fifth Amend-

ment, and hence was improperly admitted in evidence. Respondent contends that every incriminating statement was voluntary.

At the hearing on the petition twenty-eight witnesses testified, one by deposition, and fifty-six exhibits were received in evidence. From the testimony and exhibits, giving due regard to questions of credibility and the strength of recollections, I find the facts relevant to the disposition of this petition for habeas corpus to be as set forth hereinafter.

On the morning of March 5, 1957, the body of Victoria Zielinski was discovered in a sand pit in Mahwah, Bergen County, New Jersey, near her home. She had been killed by a severe blow to the head which crushed her skull. Guy W. Calissi, the Prosecutor of the Pleas of Bergen County, took charge of the investigation, centering investigative activities at the headquarters of the Mahwah Police Department in the municipal building of that borough. Assisting Mr. Calissi in the investigation were First Assistant Prosecutor Fred Galda, a number of detectives and investigators of the Bergen County Prosecutor's office, and police officers of Mahwah and of the adjoining Borough of Ramsey. Investigation of various persons who might have been acquainted with the deceased continued through the day and into the evening. The case received widespread attention from the press, representatives of which were present at the Mahwah municipal building on the evening of March 5, 1957.

At about 10:00 p.m. John Gilroy came to the Mahwah police headquarters in the company of an officer of the Ramsey police department. He informed Mr. Galda, who was then in charge, that on the evening of the previous

day, March 4, he had loaned his Mercury car to Edgar Smith after Smith, Gilroy and one Rockefeller had spent the afternoon bowling; that Smith returned the car late that evening and that on March 5, he had noticed some stains on the floor mat and seat cover; that on March 5 at Smith's request Gilroy, accompanied by Don Hommel, had picked up Smith, his wife and baby at the home of Smith's mother-in-law in Ridgewood and had driven Smith to his trailer home in Mahwah; that Smith had left his wife and baby at the trailer and accompanied Gilroy and Hommel to Ramsey; that Hommel had commented, with respect to the investigation of Victoria Zielinski's death that the police were looking for a Mercury car; that Hommel's comment about the Mercury car had produced a startled look on Smith's face; that Smith had told Gilroy that on March 4 he had vomited on his pants and had thrown the pants away; that on the trip to Ramsey from the trailer Smith had carried a pair of shoes which he said he was taking to a shoe repair man; that Smith separated from Gilroy and Hommel for a time in Ramsey, taking the shoes with him; and that Smith was then at his mother-in-law's house in Ridgewood.

Detectives Graber and Garabedian were dispatched with Gilroy to where his car was parked. At about 10:45 p.m. they examined it, concluded that some of the stains which Gilroy pointed out could have been blood, took the floor mat, and secured the vehicle. They asked Gilroy if his tires had been changed within the last two years and he told them they had not. By this time the Prosecutor's office had had plaster impressions made of certain tire tracks near the place where the body had been found. The detectives reported back to Galda, with Gilroy, and advised him of their suspicion that the stains were blood.

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Galda directed Graber and Garabedian to go to the house in Ridgewood where Smith was staying and bring him to Mahwah headquarters. Gilroy accompanied them to give directions, but remained in the car when Graber and Garabedian entered the house at about 11:30 p.m. They identified themselves as Prosecutor's detectives, told Smith that the Prosecutor would like to speak to him at the Mahwah Police Department and asked him to return with them. They had no arrest warrant. They gave no warnings of any kind, but they did inform Smith that they were bringing him in for questioning with respect to the murder of Victoria Zielinski. Smith said he was not surprised since he expected the police to question everyone with whom Victoria had been acquainted. Smith was not informed that he was free to refuse to accompany the detectives. In Garabedian's investigation report of March 12, 1957, he states that he and Graber "picked up Edgar Smith . . . and brought him to Mahwah Police Headquarters" (Ex. R-1). Graber's report of March 15, 1957 (Ex. R-3) states: "Edgar Smith was brought back to the Mahwah police station for questioning." Beginning at 11:30 p.m. March 5, 1957, Smith was under the impression that he was in police custody, and he was in fact in such custody.

Upon arriving at the Mahwah municipal building Smith and Gilroy were asked to wait in the municipal council chamber adjoining the room used as police headquarters. In that room were policemen and several newspaper reporters. When one of the reporters attempted to interview Smith a police official chased her away. Gilroy described Smith's demeanor at about this time as cocky or self-assured.

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After a short wait Smith was taken into the room used as police headquarters. At the outset of the interrogation Smith was observed by Officer Brennan of the Mahwah Police Department to be calm. He sat in a chair and placed his feet upon a desk. Mr. Galda ordered him to remove his feet. Smith asked a policeman whom he knew for a cigarette and was given one. He was question by Mr. Galda and other police officers including Graber and Captain DeMarco of the Bergen County Prosecutor's office. He was given no warnings. He was questioned about the information obtained from Gilroy and he admitted that he had spent the afternoon bowling with Gilroy and Rockefeller, had borrowed the Mercury car, had used it to drive to a service station for kerosene to fill the heater in his trailer, had become ill and vomited, had discarded a pair of pants on which he had vomited, and had disposed of a pair of shoes in Ramsey. During this interrogation Captain DeMarco observed an injury to Smith's fingers, which he said he incurred fixing a tail pipe. DeMarco told Smith to lift his trousers to see if he had any lacerations on the shinbones, and discovered contusions and lacerations on his knees. Smith explained that he had fallen while getting out of the car to vomit. Shortly after midnight on March 6, 1957, during the interrogation at Mahwah police headquarters, Officer Russo of the Mahwah police department was dispatched for a dozen coffees and sandwiches for the party at headquarters. Smith denies that he consumed either coffee or food at that time and there is no credible evidence to rebut this denial, although there is testimony from which it may be concluded that he was offered coffee and a sandwich. During the course of the interrogation on several occasions Smith was returned to the council room while

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Gilroy was questioned in the headquarters room. At about 2:00 a.m. on March 6, 1957, Captain DeMarco pulled from Smith's head a sample of hair. At about 2:30 a.m. Graber observed Smith's demeanor. In his words, "He was quite subdued, he was hanging his head, where he hadn't done that previously. He was very quiet" (Tr. at 209). The level of interrogation by this time was far from casual or routine. Galda had asked Smith to take a lie detector test. Calissi had asked Smith to go to the morgue. It is not clear how Smith could have aid the investigation by complying, and it must be assumed that Calissi was ~~then seeking~~ to wear down his resistance to meaningful interrogation. As a result of the first interrogation at Mahwah Smith was directed to accompany Galda, Captain DeMarco and Detective Graber to show them where he had vomited and where he had discarded his shoes. In Ramsey Smith disclosed the location of the shoes in a garbage can in back of some stores on Main Street. The shoes were placed in a box and impounded. A red fiber ~~which appeared similar to the~~ red sweater worn by the victim was found stuck to the instep of one of the shoes. Smith was then taken to the vicinity of Chapel Road and Ferndale Avenue, near the entrance to the sand pit; an area where he claimed to have vomited on the evening of March 4. No evidence of vomit was found. Smith was asked if he had ever been further back on the road into the sand pit and denied that he had ever been back there. He observed in the road the discarded plaster bags, the contents of which had been used to make plaster impressions at the scene of the homicide.

While Smith, Galda, DeMarco and Graber were traveling about seeking confirmation of Smith's story about

vomiting, Detective Russell Ridgeway and Lieutenant Charles Haight of the Mahwah Police went to Smith's trailer in an attempt to find the vomit stained pants, where Smith said he had discarded them. They had no search warrant or consent. In the garbage pail alongside the trailer they found a pair of gray cotton pants saturated with kerosene and in the trailer a pair of brown cotton gloves. These were not the pants Smith had described (Ex. R-34).

At that point Smith was questioned by Mr. Galda and Captain DeMarco told a different version of how and where he had discarded the pants. He explained that he had changed pants and had gone back to Pulis Avenue where he discarded the vomit covered pants. He was taken to the Pulis Avenue location, where a search for the pants was made. Smith, who was attired in light clothing, complained of being cold. The search for the pants was fruitless. Questioning with respect to the clothing Smith had worn on March 4 continued in the car, and Smith disclosed that he had worn a blue jacket which he had since washed and which was at his mother-in-law's house. Detective Graber was dispatched to that home at about 3:30 a.m. and obtained the jacket from Mrs. Smith. Galda, Captain DeMarco and Smith returned to the Mahwah police headquarters where Smith's interrogation continued. At this time Smith proffered an explanation with respect to the shoes:

> "If its those shoes that you are worried about, I think I can explain that. * * * If those shoes have any blood on them, I can explain how it got on there * * *." He said that when he got home and his knees were bloody, he wanted to change his

shoes and his good shoes were under the bed and rather than soil the rug with his bloody knees, because his pants were off, he pulled the old shoes over by his knees and he leaned on them with his knees and pulled his new shoes out from under the bed." (Ex. R-59, pp. 481-482)

It was now between 3:30 and 4:00 a.m. Lieutenant Haight and Detective Sinatra were detailed to return to Smith's trailer and measure the kerosene in the fifty-five gallon tank beside Smith's trailer. They found it to be three-fourths full. They had no search warrant and no consent. The measurement of the tank tended to cast further doubt on Smith's version of his whereabouts on the evening of March 4. At about 4:00 a.m. Mr. Galda gave instructions to obtain powerful searchlights. Smith was taken out for a further search for the trousers on which he claimed to have vomited and for evidence of vomit. Smith was first taken by Captain Wickham, Detective Sinatra, Detective Garabedian and Detective O'Hara to another location on Wyckoff Avenue near a church where he claimed to have vomited. Next he was taken to Pulis Avenue, where he was asked to assist Mr. Galda and Captain DeMarco in a search for the pants. Finally he was taken back to the area near the sand pit and asked to assist in locating vomit there. All of these searches proved fruitless. Smith was then taken back to Mahwah police headquarters.

It was now after 5:00 a.m. At 5:20 a.m. Captain DeMarco made arrangements to have Smith examined at 7:30 a.m. by the county medical examiner, Dr. Gilady. He called Investigators Nunno and Perrapato and instructed them to be at Dr. Gilady's office at 7:30 a.m.

He detailed Detective Sinatra to guard the suspect. The physical evidence which had been gathered from the murder scene and elsewhere was transferred from Mahwah to the Bergen County Prosecutor's office. Gilroy was driven home. The Mahwah phase of the investigation ended at about 5:40 a.m.

With Smith in the car, Sinatra, whom Smith knew to be armed, drove DeMarco to his home in Wyckoff so that DeMarco could refresh himself and change his clothes. Sinatra then took Smith to a diner in Midland Park where both ordered breakfast. Sinatra's best recollection is that Smith ate breakfast. Smith testified that he was too tense and ill to eat. Probably Smith did eat something, although by this time he was undoubtedly tense and ill. Smith contends that while he was with Sinatra in the diner he asked Sinatra if he could telephone his wife, or perhaps drive to his mother-in-law's home which was a few blocks away, and that Sinatra told him his instructions would not permit this. Sinatra denies that either request was made. From all the surrounding circumstances including the fact that Smith had been away from his wife all night, the geography and the fact that when he arrived at the Prosecutor's office later in the morning he made a similar request (to call his wife), which was granted, Smith's contention is more credible than Sinatra's denial. After breakfast Smith was taken back to Wyckoff where Captain DeMarco rejoined them. They then drove to Dr. Gilady's office in Hackensack where they were met by Investigators Nunno and Perrapato. Smith was given no warnings. Dr. Gilady's report (Ex. R-32) discloses and I find that Smith was stripped of all his clothing and examined for marks of injury. This examination took place in the presence of Captain DeMarco.

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The other four detectives were present, although not in the examining room. The doctor discovered indications of traumatic injury of recent origin on the left knee, the right knee and the left index finger. With respect to Smith's mental state he found "He was very restless and apprehensive and markedly agitated." Dr. Gilady's written report discloses that the examination took place at about 7:55 a.m. The report was received at the Prosecutor's office on March 6, 1957, exact time unknown. However, almost immediately after completing the examination and certainly no later than 9:00 a.m. Dr. Gilady telephoned the same information to Mr. Calissi or Mr. Galda.

Meanwhile at about 6:30 a.m. the Ramsey Police Department had found, in quite a different location than any to which Smith had made reference, a pair of blood stained pants. Arrangements were made to photograph the pants at that location and then to bring them to the Prosecutor's office at the courthouse in Hackensack.

At about 8:30 a.m. Detective Sinatra and others brought Smith from Dr. Gilady's office to the Prosecutor's office. About this time Mr. Galda, who was already at the office, had learned from a police source that Smith had a juvenile court record, and made efforts to obtain from the Juvenile and Domestic Court of Bergen County a copy of that record. He ultimately did obtain it (Ex. R-33) through the Midland Park Police Department.

Shortly after his arrival at the Prosecutor's office Smith's knee injuries were photographed for Captain DeMarco by a newspaper photographer. Thereafter Detectives Kikert and Garabedian took finerprints, fingernail clippings and scrapings from Smith. Also, shortly after

Smith's arrival, the bloody pants were delivered from the Ramsey Police Department. They were shown to Smith by Galda and Calissi and he denied they were his.

Shortly thereafter Smith asked for and received permission to call his wife. In the presence of one or more of the Prosecutor's staff this call was made. Smith told his wife he was in the Prosecutor's office, and that she should go to the office of Judge Dwyer, an attorney in Ridgewood, tell Dwyer who she was, tell Dwyer where he was, and ask Dwyer to get him out.

After this call was made the Prosecutor instructed Detective Graber to pick up Mrs. Smith and bring her to the Prosecutor's office. She was picked up promptly, before she had an opportunity to speak to Judge Dwyer, and taken by a back entrance to the Prosecutor's office. She was shown the bloody pants and identified them as Smith's. Smith was made aware of her presence in the Prosecutor's office. Thereafter she was taken back to her mother's house for the purpose of finding the flannel shirt which Smith had worn on March 4 and washed on March 5. She was brought back to the Prosecutor's office with the shirt. Mrs. Smith was given no warnings of any kind. In particular she was not advised that she could not be compelled to be a witness against her husband.[3]

Some time after 9:30 a.m. Smith was placed in a smaller office. At about the same time two detectives who had not

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[3] See L. 1900, c. 150, p. 363, §5, as amended, L. 1940, c. 22, p. 96, §1, as amended, L. 1953, c. 231, p. 1695, §1, repealed, L. 1960, c. 52, p. 465, §49. The married privilege is now governed by Rule 23(2) of the New Jersey Rules of Evidence.

previously figured in his interrogation arrived on duty. One of them, Detective DeLisle, inquired if there was a suspect in the Zielinski homicide. Captain DeMarco informed him Smith was the suspect. DeLisle suggested that too many people were participating in Smith's interrogation, and that he should be placed in less congenial surroundings. He was thereupon placed in a small office normally occupied by Captain DeMarco. DeMarco instructed DeLisle and Detective Spahr to continue Smith's interrogation. This interrogation commenced about 10:00 a.m.

At that time the Prosecutor had evidence (1) that Smith was acquainted with the victim, (2) that he was in the vicinity of the crime on the evening of March 4, (3) that he had used a car that evening which now contained suspicious stains, (4) that he had lied about his movements that evening and in particular about vomiting on his pants, (5) that he discarded a pair of shoes to which was adhered a fiber similar to that of a sweater worn by the victim, (6) that he had discarded a pair of pants, (7) that a pair of bloody pants, identified by Smith's wife as his, were found in a location other than the place where he said he discarded his pants, (8) that he had injuries consistent with having engaged in a struggle in a sand pit, (9) that he had washed a jacket and a shirt on the morning of March 5. Smith had been the prime suspect and focus of the investigation since 4:00 a.m. at the latest. Clearly the Prosecutor at 10:00 a.m. had sufficient information to charge Smith with murder, and to have him taken before a committing magistrate. The Prosecutor admitted that he was well aware of the New Jersey requirement that persons taken into custody be brought

promptly before the nearest available magistrate.[4] The Prosecutor's office was in a courthouse where there were numerous judges, any one of which could properly have acted as a magistrate. At such an appearance it would have been the duty of the court to advise Smith of his right to counsel, his right to appointed counsel in a homicide case, his right to remain silent, the use to which any statement he made could be put and his right to make a statement not under oath.[5]

There were, however, certain evidentiary holes in the State's case. First, Mrs. Smith could not be compelled at a trial to testify against her husband.[6] Thus the identification of the bloody pants might be difficult. Second, no one placed faith in the sand pit with the victim. Third, even if the pants were identified as Smith's and blood typing associated the blood stains with the victim, placing Smith with her, there was not sufficient evidence of the surrounding circumstances to show premeditation. Thus, despite the mandatory language of N.J.R.R. 3:2-3(a) Smith was not taken before a magistrate and the interrogation continued. The purpose of the interrogation after 10:00 a.m. on March 6, 1957, was not to determine who

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[4] N.J.R.R. 3:2-3(a) (1953), as amended, R.R. 3:4-1 (1969), required that a person arrested without a warrant be brought "without unnecessary delay, before the nearest available magistrate." As contrasted with the federal courts, noncompliance with this rule does not vitiate a confession subsequently obtained. Compare *Mallory* v. *United States*, 354 U. S. 449 (1957), with *State* v. *Taylor*, 46 N. J. 316, 328, *cert. denied*, 385 U. S. 855 (1966).

[5] N.J.R.R. 3:2-3(b) (1953), as amended, R.R. 3:4-2 (1969).

[6] See note 3 *supra*.

committed the offense, but to obtain evidence of first degree murder.

Shortly before this new interrogation began, but after he had been confronted with the bloody trousers, and had been photographed, fingerprinted and had had his fingernails scraped and clipped, and after he spoke to his wife on the telephone about an attorney, and after she had arrived at the Prosecutor's office too soon to have called an attorney, Smith, by this time transferred to the smaller DeMarco office, said; "I am getting out." He started to get up but was pushed by Detective Spahr into a chair and fell backwards onto the floor. Thereafter Spahr noticed a small bloodstain on the collar of his T-shirt. Spahr ordered that his clothing be removed and prison coveralls were substituted.

Spahr and DeLisle conferred outside Smith's presence on an agreed line of questioning of the suspect. They were both experienced interrogators. It was agreed that at an appropriate point in the interrogation DeLisle would afford the suspect, unexpectedly, an opportunity to state any justification for what had happened by asking "What did she do to you?" or something to that effect.

Spahr explained the technique which was pursued, both in his 1957 report (Ex. R-47) and in his testimony in this proceeding. First it was necessary to establish a common ground with the suspect. In Smith's case, after obtaining some personal history, this proved to be religion. Their common faith, and the fact that DeLisle also was of the same faith, though not practicing, served this purpose. At the same time it was necessary to maintain an authoritarian position between interrogator and suspect.

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This was accomplished by discussing in detail all the scientific aids which would enable them sooner or later to solve this crime. The suspect was led into a discussion of degrees of murder and the ensuing penalties. Reference was made to a file on another homicide, the Ledwin or Ludwin case, in which a man had killed his brother. Spahr explained that all murders are presumed to be second degree, and "there is a case where this man killed his brother and look what he got" (seven years) (Tr. 360). Then Spahr mentioned that whoever committed the act must have done so with great provocation. At this point, as planned, DeLisle asked, "What did she do to you?" Smith answered, "She hit me." The cat was out of the bag. Smith broke down and cried.

The interrogators then spoke with Smith about whether he wanted to see a priest for confession. Smith asked for a specific priest from Don Bosco High School in Ramsey. The Prosecutor was informed of Smith's breakdown. He agreed that the priest should be summoned, and sent a staff member to pick him up. Smith was given a cigarette and a glass of water. The interrogation continued, and Smith gave an incomplete but incriminating verbal statement which is recorded in Spahr's report (Ex. R-17) and to which Spahr testified at the trial. This statement admitted Smith's presence in the sand pit and an altercation with the victim, but did not admit killing in as many words and claimed a blackout or loss of memory for the crucial period following the altercation.

A priest, not the one for whom Smith had asked, but one of similar name, arrived at the Prosecutor's office some time after 11:00 a.m. He was admitted through the same rear entrance through which Mrs. Smith had been

admitted. Smith was permitted to confer with the priest in a private room.

"There is a dispute in the testimony as to whether Smith was on March 6, 1957, permitted to speak with his wife. If such a conversation took place on March 6, it took place either immediately before he was closeted with the priest, or immediately thereafter. Galda's recollection, which I find the most credible is that he authorized a meeting between husband and wife in his presence, which took place immediately before the priest's visit, on March 6. At this meeting, confronted with his wife's prior identification of the bloody pants, Smith admitted they were his. (Tr. at 577-78).

Clearly now the time had come to charge Smith and take him before a magistrate. Instead, at about this time Detective Ridgeway was detailed to procure motion picture equipment to be used when Smith re-enacted the crime. He rented such equipment at 11:30 a.m. (Ex. R-34).[7] Smith had not been asked if he would be willing to undertake any such re-enactment.

The judiciary was not left out of the picture, however, for while Smith was closeted with the priest, Calissi and Galda conferred with the Honorable Wallace Leyden, a judge of the Superior Court of New Jersey, and the Assignment Judge of Bergen County. They advised him of their desire to continue interrogation of the suspect. Instead of directing the Prosecutor to take the suspect before a magistrate, Judge Leyden arranged for a member of the petit jury panel currently sitting to be dispatched

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[7] Due to technical difficulties with the camera the film footage was never successfully developed.

to the Prosecutor's office to serve as a "disinterested witness" to Smith's further interrogation. He also arranged that one of the regular court reporters serving the courts in the building be relieved from his regular assignment in order to record the interrogation.

The desk in the Prosecutor's office was at that time equipped with two telephones. One of these was a dummy telephone, containing a concealed microphone. The microphone was connected by concealed wire to a tape recorder in an adjoining room. Spahr was instructed to set up the recording equipment with magnetic tape and he did so. It was arranged that Smith's further interrogation would continue in the Prosecutor's office, with Galda asking the questions and Calissi monitoring the recording equipment. The existence of the concealed microphone was not revealed to Smith.

Smith was told the Prosecutor was going to take a statement. He was given no warnings. He was brought into the Prosecutor's office at 12:50 p.m. Present besides Galda were Louis M. Kalstad, the "disinterested witness" procured from Judge Leyden, Arthur J. Ehrenbeck, the court reporter, Charles E. Smith, Chief of the Mahwah Police Department, Harry Voss, Chief of the Ramsey Police Department, and Spahr, the recently successful interrogator. These people were introduced. Kalstad was introduced as "from the jury panel of the Second State Session." Smith was asked, and answered:

> "Are you willing to give a voluntary statement concerning this incident? A. Yes.
>
> Q. Are you willing to give the statement under oath, Ed? A. Yes."

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He was sworn. Mr. Galda then undertook an interrogation about Smith's movements on March 4. Smith's answers embroidered upon the admissions he had previously made. At first he admitted only to the same altercation which he had admitted to Spahr, and continued to claim loss of memory. He was encouraged to detail his movements on the morning of March 5, and he spoke about a conversation with Gilroy from a phone booth, and said:

> "I went back in. That's when it dawned on me that I had been with her the night before and something snapped in the back of my head that I did it and I knew it in the back of my mind." (Ex. R-26 p. 19).

He was asked to continue the recital of the occurrences of March 5, and with respect to the conversation between Smith, Gilroy, and Hommel said:

> "First thing I said when I came out of the house I said to this fellow Don, I said, 'Was that Vickie that got killed?' I guess I was asking as if I didn't know myself, and he said, 'Yeah.'
>
> He said 'The place up there is swarming with cops and checking the registration of every Mercury registered in Bergen County.'
>
> That's when it hit me really hard I must have been the one who really dit it." (Ex. R-26 p. 19).

The quoted admissions took place at about 1:20 p.m. They were the first, and the only time that Smith actually admitted doing anything more than striking the victim once with his hand. The interrogation in the Prosecutor's office was transcribed by Ehrenbeck, and was also recorded on magnetic tape by Calissi. It continued until

2:15. Smith identified various incriminating exhibits and made further admissions as to his activities in and around the sand pit.

The transcript of Ehrenbeck's stenographic notes was was read into evidence at the trial. The existence of the magnetic tape transcription was never revealed to anyone outside the Bergen County Prosecutor's office until about a month before the instant hearing. It comprises exhibits R-23, 24 and 25 in this proceeding, and was played in open court. At several points in the transcription, especially those parts coinciding with pages 24, 28, 29, 31 and 32 of the transcript, Exhibit R-26, Smith's voice shows evidence of considerable tension. At pages 40 and 41 of exhibit R-26, and in the equivalent part of the magnetic tape transcription, Galda attempted to obtain an elaboration of the altercation, and admissions of sexual advances, but Smith, obviously tense, retreated to lack of recollection. Pressed to recall his blood stained clothing, he became evasive and equivocal (Ex. R-26, p. 42). At this point Galda suggested a recess. The magentic transcription discloses that Smith used the toilet in a small adjoining lavatory. Calissi joined the group. Galda resumed interrogation at 2:13 p.m. At page 43 of Ex. R-26 and in the corresponding part of the magnetic transcription appears:

> "Q. What we are going to do now, on the places you indicated to us, we are going to go to the area. It will be with the same people in this room and we are going in two cars and you can point out these things you mention on the spot. Is that agreeable to you?
>
> A. Yes.

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Q. And while you were in the custody of the policemen and up at the Mahwah Police Headquarters, did anybody mistreat you or anything?

A. No, sir.

Q. Everybody treat you all right?

A. Better than I expected."

Galda then elicited an admission that Smith was sober on the evening of March 4. Smith was not told that arrangements had been made for the proposed re-enactment trip as early as 11:30 a.m. The Ehrenbeck transcript of proceedings at the Prosecutor's office ends at this point, at 2:15. The magnetic transcription continues, however, beyond the time covered by R-26.

At 2:15 the corridor and rotunda of the Bergen County Court House contained a large crowd of newspaper reporters and spectators. Smith was told there was a big crowd out there and he would have to go through the crowd because there was no other way to get out. He was not told of the rear entrance used by Mrs. Smith and by the priest. Galda said, "You follow me and we'll go right through." Calissi said there was no way of sneaking out of the place and that the crowds could not be kept out because it was a public building. Galda said, "Eddie we're not going to put handcuffs on you or anything." He also said, "I think you ought to shave." He gave Smith an electric razor and instructed him to shave, which Smith did.

Numerous photographs taken of Smith after he left the Prosecutor's office on March 5, 1957, show him clean shaven and in clothing other than the prison coveralls which he wore while being interrogated by Spahr. Thus at some point before he was exposed to the press Smith's

prison coveralls were removed and his own or some other outerclothing substituted.

Smith was taken out through the rotunda and main entrance of the Bergen County Court House, where he was photographed by press photographers. Exhibit P-4, a United Press International Photograph, shows Smith entering a car outside the Bergen County Court House. He appears fatigued. He was placed in a car in the company of several detectives, Galda, Kalstad, and the court reporter Ehrenbeck, who continued to record the ongoing interrogation. Galda caused Smith to identify landmarks in the vicinity of the sand pit, such as the place where he picked of Victoria Zielinski and the place where he drove Gilroy's car into the driveway of the sand pit. That the purpose of the interrogation was to obtain evidence which would sustain a first degree murder charge is clear. For example:

> "Q. Did you pull in on your own accord without any suggestion?
> A. I did." (Ex. R-26 p. 47)

Smith was subjected to a rather rigorous examination with respect to his story of the altercation, the questions seeking to establish the possibility of premeditation. He was asked to identify property of the victim found at locations which he pointed out. He admitted having returned to the sand pit with a searchlight. Smith was photographed in the vicinity of the murder scene by press photographers and by Ridgeway's motion picture camera.[8]

Smith was then taken to the trailer camp where he lived. The party arrived at the trailer at 3:22 p.m.

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[8] See note 7 supra.

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The party then returned to the sand pit at 3:40 P.M. At 3:42 p.m. they returned to the trailer and obtained the five gallon kerosene can which Smith said he used on March 4. There was no search warrant. There were no warnings. The party concluded its business at the trailer at 3:45 p.m. and proceeded to the Mahwah Police Headquarters. At Mahwah Smith was again photographed by the press.

At Mahwah a complaint charging Smith with the murder of Victoria Zielinski was drawn. Thereafter at about 5:00 p.m. he was brought before Magistrate Young of the Mahwah Municipal Court, the charge was read, and the warnings which N.J.R.R. 3:2-3(b) required were given. Smith asked for and was denied bail. At the rear of the courtroom after his appearance before the magistrate he was posed for news photographs.

Smith was next taken by several detectives to dinner at a Hackensack restaurant. The prosecutor joined the dinner party. A reporter was permitted to be near enough to the party to overhear the conversation and observe Smith's demeanor. After dinner Smith was remanded to the Bergen County jail.

Upon instructions of the Prosecutor's office Ehrenbeck forthwith prepared a transcript of his notes of Smith's interrogation. Based on information obtained from the Prosectuor's staff he captioned the transcript:

State of New Jersey)	
v.)	Charge: Murder
Edgar H. Smith)	
Defendant[9])	

[9] At one point at least in the magnetic transcription the Prosecutor referred to Smith as the defendant.

He delivered the ribbon and three carbon copies to the Prosecutor's office on or about March 8, 1957.

The Prosecutor was aware that Smith's family had retained Joseph Gaudielle on March 7, 1957. Gaudielle informed the Prosecutor that he had given Smith instructions not to sign any statement. Nevertheless, on March 11, 1957, Captain DeMarco instructed Detective DeLisle to take the Ehrenbeck transcript to the Bergen County Jail for the purpose of having it signed. DeLisle handed Smith a copy and told him "I want you to read it, make any errors or corrections or additions to it you might want to, and sign it." .(Tr. at 782). Smith read the statement. He was again asked to sign it, but refused because his lawyer had advised him not to do so. In DeLisle's words:

> "It was then that he said to me that he was amazed at the ability of the Court reporters to be able to catch everything that was said, and he just thought it was a wonderful thing that they could [sic] this ability." (Tr. at 783).

This version is slightly at variance with that to which DeLisle testified at trial. There he said:

> "I asked him if the statement was accurate and he said 'Yes, it was accurate.'
>
> He commented upon how accurate it was and it was amazing that the court stenographer could take down with such accuracy such a statement." (Trial tr. at 521).

The difference between the two versions is significant, for the State trial testimony was elicited for the purpose

of complying with the rule of *State* v. *Cleveland,* 6 N. J. 316, 78 A. 2d 560 (1951)[10] and thereby making the Ehrenbeck transcript (Ex. P-84 in the trial record) admissible in evidence as a confession. The state trial court, on the basis of DeLisle's testimony, admitted this transcript in evidence. The less precise version testified to before this court might have produced a different ruling.[11]

On March 8, 9, and 11, 1957, Smith was transferred temporarily from the Bergen County jail to the Prosecutor's office. In each instance the transfer was accomplished by virtue of a written request from the Prosecutor addressed to Hon. Arthur J. O'Dea, Presiding Judge of the Bergen County Court. Each requisition was approved in writing by Judge O'Dea (Exhibits P-7, -8, -9, -10). The purpose of these transfers was to have Smith examined by three state appointed psychiatrists for the purpose of determining his sanity. The Prosecutor discussed these examination with Frank Boggia, assistant to Mr. Gaudielle, who consented. Dr. Collins, who conducted the first examination on March 8, 1957, also spoke to and obtained consent from Mr. Gaudielle,[12] who remained pres-

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[10] This rule governs the admissibility of written confessions and provides that "until the statement is signed or its correctness acknowledged in some fashion by the defendant, it constitutes merely a memorandum of what was said and is inadmissible in evidence." 6 N. J. at 329, 78 A. 2d at 567.

[11] There can be no doubt that the admission of Ex. P-74 in evidence had a prejudicial effect beyond the oral testimony of Ehrenbeck as to the same admissions. "A thing in writing carries, particularly with laymen, a weight of its own." *Springer* v. *Labow,* 108 N. J. L. 68, 70, 155 A. 476, 477 (S. Ct. 1931).

[12] Mr. Gaudielle is deceased and thus his version of this consent could not be adduced in the instant proceeding.

ent while Collins spoke to Smith. With respect to the three examinations Mr. Calissi was asked:

> "Q. Was there any agreement between you and Mr. Gaudielle as to the use to which the reports of these examinations, or the content of these examinations would be put.
>
> A. No, sir. This was a kind of a routine matter in a case of this kind. First, it was my impression that it was necessary to find out what the mental status of an accused was at the time of the commission, in order that I discharge my duties properly in determining the degree. And, as I said, Mr. Gaudielle had absolutely no objection to—in fact, I believe he was at one of them, he was there. And, of course, we left before the examination took place. And I don't remember which it was, but it was the first one. And he knew there were going to be two others after that." (Tr. at 1026).

During the three examinations Smith was asked about his claimed loss of memory as to some events of March 4, and while sticking to that version, repeated some of the incriminating statments he had theretofore made. The incriminating admissions to the psychiatrists were elicited from Smith when he took the stand at his trial and were referred to in the Prosecutor's closing address as corroborative of his confession.

Gaudielle did not represent Smith at the trial. John E. Selser, the attorney who did represent him, testified in these proceedings. In 1957 he was an experienced criminal defense attorney in Bergen County, a former First Assistant Prosecutor of that county and a former Deputy

Attorney General. He testified that in 1957 it was the common practice ". . . to anticipate the possible defense of insanity and in every such case Dr. Collins or other competent psychiatrists were called by the Prosecutor to make an appraisal as to the psychotic health of the accused." (Tr. at 1255). He testified:

> "Q. What was the purpose of these examinations, sir?
>
> A. Appraisal of the psychotic status of the accused.
>
> Q. Was there any other purpose? A. No.
>
> A. No.
>
> Q. Was that purpose understood by the Bar?
>
> A. Yes.
>
> * * *
>
> Q. What was the understanding of the Bar as to that use?
>
> A. The understanding of the Bar was very definitely a program to arm the prosecution as against the possible defense of insanity, and for no other purpose."

There is no direct conflict between Mr. Calissi's testimony that "[t]his was a kind of routine matter in a case of this kind" and Mr. Selser's testimony as to the understanding of the Bar. Moreover only such an understanding as to that which Mr. Selser testified would explain Mr. Gaudielle's willingness to permit his client to make incriminating statements to the psychiatrists after advising him not to sign a statement and informing the Prosecutor that he had so advised him. Judge O'Dea's signature on the requisition orders is also consistent with such an understanding, for it is inconceivable that the court

would order the production of a represented defendant for interrogation for purposes of incrimination beyond the issues of criminal responsibility and present sanity. This understanding is consistent with N.J.S. 2A:163-2 and the procedure under that statute later formally elaborated in *State* v. *Whitlow*, 45 N. J. 3, 210 A. 2d 763 (1965).[13] The statements made to the three psychiatrists Drs. Collins, Spradley and Zigarelli, in March of 1957 were made pursuant to such an understanding.

The foregoing recital, then, sets forth the historical facts from which must be determined the ultimate issue of voluntariness for federal constitutional purposes. The November 30, 1970, opinion of this court, referred to earlier, requires that this opinion discuss the evidentiary standard applied in making findings both of historical facts and of the ultimate issue. That opinion held that the respondent would in this hearing have the burden of proving voluntariness.[14] It did not, however, decide which

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[13] "If an adequate opinion cannot be formed without inquiry into the circumstances attending the alleged crime, the inquiry should be made. The defendant should cooperate therein fairly, unless he lacks mental capacity to do so. The evidentiary character of any inculpatory statements shall be limited expressly to the issue of insanity, and shall not be admissible on the issue of guilt." 45 N. J. at 26, 210 A. 2d at 775.

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[14] This ruling was an interpretation of 28 U.S.C. §2254(d). That subsection states that factual determinations made by a state court shall be presumed to be correct unless the applicant shall establish one of eight enumerated circumstances or such shall otherwise appear. One of these circumstances is

(*Footnote continued on following page*)

evidentiary burden respondent must meet. Three alternatives are possible. Respondent (nominally the Warden of the State prison but actually the State) might be required to prove voluntariness beyond a reasonable doubt. This would be its burden in a criminal trial in New Jersey. *State* v. *Franklin*, 52 N. J. 386, 245 A. 2d 356 (1968); *State* v. *Yough*, 49 N. J. 587, 231 A. 2d 598 (1967).[15] Respondent might be required to meet the standards of "convincing evidence." This standard applies to a habeas cor-

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(Footnote continued from preceding page.)

"(3) that the material facts were not adequately developed in the State court hearing."

The November 30, 1970 ruling of this court held that material facts were not adequately developed in the state court record. Section 2254(d) goes on to say:

"And in an evidentiary hearing in the proceeding in the Federal Court . . . unless the existence of one or more of the circumstances set forth in paragraphs 1 to 7, inclusive, is shown by the applicant . . . the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State Court was erroneous."

The opinion reasoned that only in the absence of all the listed instances did the presumption and burden of proof specified in §2254(d) apply, and that where one of the listed criteria appeared the respondent had the burden of proof.

[15] See also *Pea* v. *United States*, 397 F. 2d 627 (D. C. Cir. 1968) and the cases therein cited, which discuss whether the government must show the voluntariness of a confession beyond a reasonable doubt before it may be admitted in evidence. These cases were all direct reviews of convictions and are not authority for the proposition that a habeas corpus court should impose the same burden on the State as it would have to meet in a criminal trial.

pus petitioner in those cases in which, because none of the eight criteria specified in 28 U.S.C. §2254(d) have been met, the burden rests upon him to show that the state court factual determination was erroneous. Finally respondent might be entitled to prevail on no more than a preponderance of the evidence. Research has disclosed no case deciding the point. It is discussed but not reached by Judge Mansfield in *United States ex rel. Castro* v. *LaValle*, 282 F. Supp. 718, 723 (S. D. N. Y. 1968).

The question arises, of course, because of this court's prior ruling, which is law of the case, that when the petitioner establishes by reference to the state court record one of the criteria of 28 U.S.C. §2254(d), the respondent must bear the burden of proof. Perhaps one could distinguish between the burden of going forward (risk of failure to produce evidence) and the burden of persuasion (risk of failure to persuade by the applicable evidentiary standard) and hold that the later burden remained on petitioner. We conclude, however, that Judge Barlow's prior ruling for this court rejected such an approach, and placed on the State both the burden of going forward and the burden of persuasion.

That ruling should not, however, in this collateral attack on a judgment of conviction, have the additional effect of imposing on the State the same burden it had to meet to obtain the judgment in the first instance. Petitioner's contention that the State must prove voluntariness beyond a reasonable doubt is therefore rejected. If none of the criteria listed in 28 U.S.C. §2254(d) applied, the habeas corpus petitioner would have had to meet the evidentiary standard of convincing evidence. Because of deficiencies in the record developed in the state court on the

critical issue of voluntariness the petitioner has been relieved of that burden. A persuasive case can be made for requiring the State, in these circumstances, to meet the same convincing evidence test. In the absence of a binding precedent, however, this fact finder has assumed that the State need only persuade by a preponderance of the evidence. The factual findings set forth hereinabove were made pursuant to that standard. Few of these facts are seriously disputed in any event. The real dispute is the ultimate conclusion to be drawn from such facts. Substantially the same factual findings and certainly the same ultimate conclusion would be reached if the burden of persuasion rested on the petitioner.

If *Miranda* v. *Arizona*, 384 U. S. 436 (1966) were applicable to this case the violation of each of the prophylatic rules for custodial interrogation laid down in that case would require issuance of the writ. *Miranda* is not retroactive. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). However a pre-*Miranda* confession is judged by whether, considering the totality of the circumstances, it was voluntarily given or was the result of overbearing by the police. See, *e.g.*, *Clewis* v. *Texas*, 386 U. S. 707, 708 (1967); *Davis* v. *North Carolina*, 384 U. S. 737, 739 (1966); *Fikes* v. *Alabama*, 352 U. S. 191, 197-98 (1957). Since it became clear in *Brown* v. *Mississippi*, 297 U. S. 278 (1936), that admission of a coerced confession violated the due process clause of the Fourteenth Amendment, the substantive test of voluntariness has become increasingly meticulous. Physical brutality was the first type of coercion to which the federal courts gave attention. See *Brown* v. *Mississippi*, *supra*; cf. *Brooks* v. *Florida*, 384 U. S. 413 (1967). But "[s]ince *Chambers* v. *Florida*, 309 U. S. 227, [the Supreme] Court has recognized that coercion can be men-

tal as well as physical, that the blood of the accused is not the only hallmark of an unconstitution inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). "When a strong suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal." *Watts* v. *Indiana*, 338 U. S. 49, 53 (1949). The decision to confess must be freely as well as rationally made. *Lynumn* v. *Illinois*, 372 U. S. 528 (1963).

> "[A] confession is [not] 'voluntary' simply because the confession is the product of a sentiment choice. 'Conduct under duress involves a choice,' and conduct . . . not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint." *Haley* v. *Ohio*, 332 U. S. 596, 606 (1948).

The choice must be the voluntary product of a free and unconstrained will. *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963).

It is true that in each case in which the Supreme Court has held that the totality of circumstances disclosed a confession to be the product of coercion[16] the presence or

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[16] See *Darwin* v. *Connecticut*, 391 U. S. 346 (1968); *Greenwald* v. *Wisconsin*, 390 U. S. 519 (1968); *Brooks* v. *Florida*, *supra*; *Clewis* v. *Texas*, *supra*; *Davis* v. *North Carolina*, *supra*; *Haynes* v. *Washington*, *supra*; *Lynumn* v. *Illinois*, 372 U. S. 528 (1962); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Reck* v. *Pate*, 367 U. S. 433 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960); *Spano* v. *New York*, 360 U. S. 315 (1959); *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Fikes* v. *Alabama*, *supra*; *Leyra* v. *Denno*, 347 U. S. 556 (1954); *Harris* v. *South Carolina*, 338 U. S. 68 (1949); *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949); *Watts* v. *Indiana*, *supra*; *Haley* v. *Ohio*, *supra*; *Malinski* v. *New York*, 324 U. S. 401 (1945); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Ward* v. *Texas*, 316 U. S. 547 (1942); *White* v. *Texas*, 310 U. S. 530 (1940); *Chambers* v. *Florida*, 309 U. S. 227 (1940).

absence of some single fact may serve to distinguish petitioner's precise situation. The assessment of voluntariness, however, "requires more than a mere color-matching of cases." *Reck* v. *Pate*, 367 U. S. 433, 442 (1961). Reference to factual configurations in similar Supreme Court cases reveals what must be considered impermissibly coercive as a matter of law. Guided by those factual configurations this court must determine in the first instance whether the will of Edgar Smith was overborne by the acts of the various law enforcement officials. This determination must look to the totality of circumstances as well as to the established legal significance of each individual circumstance.

The crucial interrogation in this case was that conducted by Spahr and DeLisle beginning at about 10:00 a.m. on March 6, 1957. No case has come to our attention in which since *Chambers v. Florida, supra,* any federal appellate court, on a record disclosing the totality of circumstances surrounding that interrogation, approved of the use of the resulting admissions. Those circumstances include the absence of *Miranda*-type warnings; the knowledge on the part of the prosecuting authorities that Smith wanted counsel and Smith's knowledge that his effort to reach an attorney had been frustrated;[17] the fact of continuous custody from 11:30 p.m. on March 5, 1957; the fact of intermittent but substantially uninterrupted, incommunicado interrogation for most of the intervening time; the submission to a naked physical examination; the taking of hair samples, fingernail pairings and fingerprints; the removal of his clothing and the substitution of prison garb; the forcible physical reaction to Smith's one

[17] Cf. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

effort to leave; the confrontation with the bloody pants; the continuation of interrogation after Smith's wife identified the pants as his; the substitution of a new relay of interrogators; Smith's gradual deterioration of spirit from cocky and confident at 11:30 p.m. on March 5, to subdued at 2:30 a.m. on March 6, to very restless and apprehensive and markedly agitated at 7:55 a.m. on March 6, to broken and crying when finally trapped into an incriminating admission after 10:00 a.m.; the interrogators' preconceived scheme for trapping Smith into a damaging admission, including their appeal to religion, their indication of the certainty of scientific detection; and the suggestion of leniency implicit in the reference to the Ledwin case.

Shedding light on the essentially coercive nature of the Spahr-DeLisle interrogation is the subsequent conduct of the Prosecutor who, instead of taking Smith before a magistrate at a time when under the applicable state court rule this was clearly required, continued the incommunicado interrogation for an additional six hours for the purpose of obtaining additional incriminatory statements.

The admissions made to Detectives Spahr and DeLisle on the morning of March 6, 1957, were the results of a cumulation of coercive circumstances which made those admissions involuntary under federal constitutional standards. Moreover, the totality of circumstances, beyond the sum of component facts, compels me to find that these admissions were involuntary. The admission of the testimony of Spahr and DeLisle at Smith's trial violated the due process clause of the Fourteenth Amendment.

The Ehrenbeck transcript (Ex. R-26 (Ex. 3-84 in the trial record)) stands on no better footing. The coercive

circumstances increased by the time the interrogation reflected therein commenced. Adding to circumstances already alluded to was the presence of a juror and an official court reporter both so identified to Smith. Smith must have been left with the quite correct impression that even the judicial machinery was allied with the Prosecutor in his ongoing interrogation. The calculated steps taken to give an appearance of voluntariness during this interrogation are not convincing. They tend as much to shed light on the essentially coercive atmosphere as to show that Smith was acting voluntarily. The admissions made by Smith on the afternoon of March 6, 1957, at the Prosecutor's office, at the murder scene, and at the trailer, were all the result of coercion, and their admission at the trial violated the due process clause of the Fourteenth Amendment.

Independent of the coercive circumstances surrounding the interrogation reflected in the Ehrenbeck transcript, there was no break in the chain of events between that interrogation and the admissions made to Spahr and DeLisle. This alone is enough to make the later confession inadmissible. *Darwin v. Connecticut,* 391 U. S. 346, 349, 351 (1968); *Leyra v. Denno,* 347 U. S. 556 (1954).

The "acknowledgement" admission made to DeLisle in the Bergen County jail on March 11, 1957, must next be considered. That incident falls squarely within the holding of *Massiah v. United States,* 377 U. S. 201 (1964). Were I free to do so I would apply *Massiah* retroactively to this case. That course is ruled out by *United States ex rel. Allison v. New Jersey,* 418 F. 2d 332 (3 Cir. 1969), cert. denied, 39 U.S.L.W. 3149 (Oct. 12, 1970), holding *Massiah* to be non-retroactive, although it could have been

decided on the ground that it involved the equivalent of a guilty plea. See *McMann v. Richardson,* 397 U. S. 759 (1970); *Parker v. North Carolina,* 397 U. S. 790 (1970); cf. *Brady v. United States,* 397 U. S. 472 (1970).

But in this case, in any event, the "acknowledgement" obtained so as to make the Ehrenbeck transcript admissible in evidence was the fruit of the prior coercive questioning, and the prior illegality was not attenuated by intervening events. To the contrary, this was a clear case of an attempt to exploit the illegally obtained transcript. Cf. *Wong Sun v. United States,* 371 U. S. 471, 488 (1963). Use of the verbal acknowledgement in order to qualify the Ehrenbeck transcript for admission in evidence as a written confession violated the due process clause of the Fourteenth Amendment.

Finally there is the use made at trial of the admissions made to the psychiatrists. These, too, were so directly related to the admissions elicited on March 6 that they could not properly have been availed of. The fact that they were brought out at the trial on cross-examination of Smith puts them in no better footing. They resulted from the chain of coercive events. *Harrison v. United States,* 392 U. S. 219 (1968). Moreover, as found hereinabove, the examination by the psychiatrists took place pursuant to an understanding of the Bar that amounted to informal compliance with N.J.S. 2A:163-2. The examinations were facilitated by court orders transferring the prisoner from the jail to the Prosecutor's office. They could have been ordered. *State v. Whitlow, supra.* Use of incriminating statements obtained in such circumstances is impermissible. Cf. *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964). The actual use of compelled

incriminatory statements was never permitted, even under *Twining v. New Jersey,* 211 U. S. 78 (1908) and *Adamson v. California,* 332 U. S. 46 (1947). The use made in Smith's trial was far more than mere prosecutorial comment. The admissions to the psychiatrists were used to authenticate the truthfulness and voluntariness of other statements improperly admitted.

The respondent presented the testimony of the same three psychiatrists in this hearing. Each stated his expert opinion that the admissions made by Smith on March 6 were the result of his free will and rational choice. I have taken this testimony into account despite the fact that it was strenuously objected to on most of the usual grounds advanced in opposition to the use of expert testimony. On all the evidence I have reached a conclusion different from that proposed by these experts. Expert opinion evidence is valuable on the ultimate issue to be decided only to the extent that the expert can by reasoned exposition demonstrate to the trier of fact the factual basis for his opinion. The testimony of the psychiatrists, rested upon an examination of Smith held for a different purpose over thirteen years ago, and on inferences to be drawn from written materials only some of which are in evidence. No convincing demonstration of the likely truth of their conclusions was made. Indeed in some instances their testimony acknowledged the presence of coercive factors during Smith's interrogation. Thus, while giving due regard to their testimony I have rejected their proposed conclusions on the ultimate issues decided in this proceeding.

The writ of habeas corpus will issue unless within sixty days of the date hereof the State of New Jersey shall

grant to the petitioner Edgar Smith a new trial on the indictment charging him with the murder of Victoria Zielinski, at which none of the admissions made by him on the morning of March 6, 1957, to Detectives Spahr and DeLisle, the admissions in the Ehrenbeck transcript, the "acknowledgement" of that transcript made to Detective DeLisle on March 11, 1957, or the admissions made to Drs. Collins, Spradley and Zigarelli in March of 1957 shall be admitted in evidence.

It is so Ordered.

JOHN J. GIBBONS
Circuit Judge Sitting by
Designation

APPENDIX D

Opinion of the District Court Granting an Evidentiary Hearing

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 766-65

THE UNITED STATES OF AMERICA *ex rel.* EDGAR H. SMITH

v.

HOWARD YEAGER, Warden, New Jersey State Prison at Trenton.

BARLOW, *District Judge.*

This is a petition for a writ of habeas corpus filed by Edgar H. Smith pursuant to the provisions of 28 U.S.C. §2241. For the purposes of this opinion, a brief recitation of the facts will suffice.

On March 5th, 1957, in Mahwah, New Jersey, Victoria Zielinski was found dead. As a result of their investigation, the police took the petitioner into custody at approximately 11:00 o'clock that same evening. The investigation and interrogation of Smith continued until about noon of the following day. At that time, a series of questions was asked of Smith. The questions and Smith's an-

swers thereto were recorded stenographically. Shortly thereafter, Smith was indicted. Within three day's after the indictment, a Detective de Lisle visited Smith in jail and requested him to read and sign the transcribed question and answer statement. Smith refused to sign, stating that his lawyer had instructed him not to do so. Detective de Lisle however, elicited from Smith an admission that the transcribed statement was "accurate".

Smith appealed, unsuccessfully, and thereafter initiated other post-conviction proceedings, including this petition, which was filed in 1965 and which requested, among other things, a federal evidentiary hearing as to the voluntariness of the unsigned question and answer statement. The District Court denied his application for a hearing and dismissed the petition. Smith appealed to the United States Court of Appeals for the Third Circuit, which affirmed the District Court. The Court of Appeals found, *inter alia*, that Smith's attorney had waived the demanded evidentiary hearing. *United States ex rel. Smith* v. *Yeager*, 395 F. 2d 245 (3rd Cir., 1968). That decision was reversed by the United States Supreme Court, which held that the evidentiary hearing had not been waived, and remanded the case here for further proceedings, including a reconsideration of Smith's request for such a hearing. *Smith* v. *Yeager*, 393 U. S. 122, 89 S. Ct. 277, 21 L. Ed. 2d 246 (per curiam) (1968).

Upon remand here, and at the suggestion of counsel, it was agreed to first test the voluntariness of the petitioner's question and answer statement in the light of the holding in *Greenwald* v. *Wisconsin*, 390 U. S. 519, 88 S. Ct. 1152, 20 L. Ed. 77 (1968). Briefs were submitted. Fol-

lowing oral argument, the relief sought by the petitioner on the basis of *Greenwald* was denied by this court.[1]

Accordingly, we now turn to the primary question. Is Smith entitled to an evidentary hearing in federal court as to the voluntariness of the question and answer statement introduced in evidence against him at his State trial?

In *Smith* v. *Yeager, supra,* the United States Supreme Court, while determining that Smith had not waived his rights to an evidentiary hearing, expressly did not pass on whether or not Smith was entitled to such a hearing. In fact, as has been noted, the case was remanded to the District Court for the resolution of that very question.

During the course of that opinion, however, the Supreme Court, citing its earlier expression in *Townsend* v. *Sain,* 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), observed that:

> "'If, for any reason not attributable to the inexcusable neglect of petitioner . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled.' Townsend v. Sain, . . . at 317. *Petitioner's assertion that he comes within this principle is not controverted by respondent or by the record below.*" Id., at page 126. (Emphasis added.)

Additionally, by letter of January 21st, 1969, a then assistant prosecutor of Bergen County, assigned to the

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[1] See the unreported opinion of this court entitled *United States of America ex rel. Smith* v. *Yeager*, Civ. No. 766-65 (August 4th, 1970). The court declined to certify that there existed probable cause for appeal from the order reflecting that opinion.

Smith case, agreed with counsel for the petitioner, that the Supreme Court's opinion mandated the granting of an evidentiary hearing for Smith. The State has since abandoned that position and now opposes such a hearing. See Point II, Respondent's *Memorandum for Pre-hearing Conference of April 17th, 1970.*

This court has carefully reviewed the Supreme Court's opinion, the record, the briefs of the parties, and the various authorities cited therein. The holding in *Townsend* v. *Sain, supra,* requires a federal court to provide an evidentiary hearing to an applicant for a writ of habeas corpus in certain enumerated circumstances. Once such circumstance arises when "material facts were not adequately developed at the state-court hearing". Id., at page 313. It is true that in this case the State court did conduct a hearing on the issue of the voluntariness of Smith's statement, but it is also clear that the relevant facts now alleged by the petitioner were not raised and developed by him at that time. Moreover, this court is satisfied that the failure to raise these facts at trial was not the result of the inexcusable neglect of either Smith or his counsel. Id., at page 317. See, also, *Fay* v. *Noia,* 372 U. S. 391, 438, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

Accordingly, this court reaches the same view expressed by the Supreme Court in *Smith* v. *Yeager, supra,* that nothing in the record nor in respondent's arguments indicates that Smith is not entitled to an evidentiary hearing in federal court. An evidentiary hearing on the issue of the voluntariness of Smith's question and answer statement is, therefore, granted.

Having accorded the petitioner the evidentiary hearing which he has sought, it becomes necessary for the court to address itself to two secondary questions:

1. At such an evidentiary hearing, which party bears the burden of proof?

2. Has the petitioner sufficiently exhausted his State remedies as to the voluntariness of his so-called "accuracy" admission so as to enable him to raise that issue in the evidentiary hearing?

The resolution of the first question is least troublesome. Both parties concede that the burden of proof in habeas corpus proceedings generally falls on the petitioner. Both parties agree further, however, that 28 U.S.C. §2254(d) reverses the general pattern if the existence of one or more of eight particular circumstances is established. See Petitioner's *Memorandum for Pre-hearing Conference of April 10th, 1970,* pages 10-22, and Respondent's *Memorandum, supra,* at page 27-28.

More specifically, 23 U.S.C. §2254(d) provides as follows:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> * * *

> "(3) that the material facts were not adequately developed at the State court hearing;
>
> * * *
>
> "And in an evidentiary hearing in the proceeding and in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, * * * the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State Court was erroneous."

Having previously decided herein that the petitioner is entitled to an evidentiary hearing for the very reason that the material facts were not adequately developed at the State court hearing, it is clear that the statute transfers the burden of proof to the State.[2]

There remains only the dispute as to whether Smith has exhausted his State court remedies with respect to the accuracy admission question, and, even if he has, whether this court may properly grant the petitioner an evidentiary hearing on the voluntariness of the accuracy admission. Assuming, *arguendo,* that the exhaustion of State remedies has been demonstrated, is the accuracy admission question cognizable in a Federal court evidentiary hearing?

In addition to compelling a Federal evidentiary hearing where material facts were not developed in the State-

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[2] The twin question as to the quantum of proof to be borne by the State in Smith's evidentiary hearing is more complex and is not considered here as premature.

court hearing, *Towsend* v. *Sain, supra, also* requries that such a hearing be granted under circumstances wherein "the merits of the factual dispute were not resolved in the state hearing". Here, the State does not contest the petitioner's assertion that the State trial court's hearing as to the voluntariness of the question and answer statement did not include a determination of the voluntariness of the "accuracy" admission, despite the intimate relationship between the two. It follows, therefore, that if the exhaustion of remedies requirement proves no barrier, an evidentiary hearing on the accuracy admission question must also be granted.[3]

Has Smith exhausted his State remedies? In a letter, in lieu of a brief, dated October 6th, 1970, counsel for petitioner insists that Smith raised the accuracy admission question in his petition for writ of habeas corpus filed in the Bergen County Court in 1965. That court denied the relief sought and, subsequently, leave to appeal from that determination was also denied. Thus, if Smith's State petition clearly raised the issue, all available State remedies have been exhausted. The difficulty here, however, is that Smith submitted a somewhat inartistically drawn *pro se* petition to the State court, and it is not at all clear whether the voluntariness of the accuracy admission was placed squarely in issue.

In any event, given the peculiar circumstances of this case, it is not necessary that this court attempt to devine the full scope of the issues raised by Smith's 1965 State

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[3] Additionally, since the cited circumstance from *Townsend* also appears in 28 U.S.C. §2254(d), it is clear that the burden of proof on the accuracy admission question would also fall upon the state.

habeas petition. For, even though 28 U.S.C. §2254(b) prohibits the granting of habeas corpus relief in the absence of the exhaustion of State remedies, the Federal courts, in certain instances, have fashioned exceptions to this general proscription. In *United States ex rel. Gockley v. Myers,* 411 F. 2d 216, 219 (3d Cir., 1969) (en banc), the court stated:

> "The requirement that a habeas corpus applicant exhaust his State court remedies, now embodied in 28 U.S.C. §2254, is a principle of comity and does not rise to jurisdictional proportions. If the case is sufficiently exceptional the doctrine need not be rigidly followed to the point of inflicting manifest injustice."

Gockley involved an application for a writ of habeas corpus based upon an alleged involuntary confession, in which the court found a number of exceptional circumstances, including: (1) that the return of the case to the State court would fragment the issues before the Federal court; and (2) that remand to the State court would only further delay the disposition of a long-standing petition for habeas corpus relief. In view of such a combination of unusual circumstances, the Third Circuit concluded:

> "* * * The principle of comity requiring that the Federal courts should ordinarily yield their jurisdiction so that State courts may deal in the first instance with a collateral attack on State convictions, is here attenuated almost to the vanishing point."
>
> "* * * The completion of the decision by the District Court will do no injury to Federal-State

relationship, but instead will serve to prevent a belated fragmentation of the proceeding in which Federal jurisdiction has already been asserted a number of times over a period of years." Id., at page 219.

There can be no doubt that the *Smith* case qualifies for exceptional treatment on both primary grounds relied upon in *Gockley*. The petition here was filed by Smith in 1965. Since that time this matter has been the subject of extensive reviews, decisions and appeals, including the present remand from the United States Supreme Court. This extraordinary litigative history, by itself, constitutes an exceptional ground warranting the retention of the accuracy admission question in this court. Moreover, even if the passage of time was not alone deemed to be sufficient justification to retain that question for determination here, the intimate relationship of the issues pressed by Smith militates against the return of one of those issues to the State. This court has granted Smith a Federal evidentiary hearing as to the question and answer statement. It is clearly in the interest of justice that the interrelated issue of the voluntariness of the accuracy admission be heard and be resolved at that same hearing.

Accordingly, even if Smith had not exhausted his State remedies with respect to the voluntariness of his "accuracy" admission, the resolution of that question is nonetheless cognizable at the evidentiary hearing granted petitioner herein.

The parties are directed to expedite arrangements for necessary discovery. If satisfactory arrangements cannot be agreed upon, notice shall be given to the court forthwith. The evidentiary hearing accorded the petitioner will be held on January 19th, 1971. All discovery must be completed on or before January 11th, 1971.

GEORGE BARLOW, U.S.D.J.

APPENDIX E

Order Staying Issuance of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1490

THE UNITED STATES OF AMERICA *ex rel.* EDGAR H. SMITH

v.

HOWARD YEAGER, Warden, New Jersey State Prison at Trenton.

Appellant.

Present:

GANEY, VAN DUSEN and ALDISERT, *Circuit Judges.*

After consideration of appellant's Motion For Stay of Mandate, the Memorandum In Support of such Motion, and the two letters from relator's counsel dated August 13, stating that relator "wishes to remain on Death Row rather than be confined in the general prison population at Trenton" and that "appellee [relator] would oppose any transfer to the County Jail if the mandate issues,"

It is ORDERED that the issuance of the mandate is stayed for thirty (30) days beyond August 9, 1971, in accordance with the terms of Rule 41(b) of the Federal Rules of Appellate Procedure, until further order of this court, with-

out prejudice to relator's right to apply to the courts of the State of New Jersey for release on bail under appropriate New Jersey law. See *State v. Konigsberg*, 164 A. 2d 740, 745 (1960).

Judge Aldisert dissents and would deny the Motion For Stay of Mandate.

BY THE COURT:—

J. CULLEN GANEY
Senior Circuit Judge

Dated: August 17, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-331

HOWARD YEAGER, Warden, *Petitioner*

v.

UNITED STATES EX REL. EDGAR SMITH, JR., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are as yet unreported. They appear in the Appendix to the Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the grant of the writ of habeas corpus by the District Court was entered on August 2, 1971. The Petition for Writ of Certiorari was timely filed on September 7, 1971. It invokes the jurisdiction of this Court under 28 U.S.C. § 2254(1), the habeas corpus statute. Jurisdiction properly lies under 28 U.S.C. § 1254(1).

RESTATEMENT OF QUESTIONS PRESENTED

1. Was there sufficient evidence to support the factual findings of the District Court, unanimously affirmed by the Court of Appeals, as to the circumstances surrounding respondent's six in-custody statements?

2. Did the Court of Appeals err, after its own "independent review of the evidence," in concluding unanimously that all six statements were coerced, or the fruit of coercion, under the 1957 "totality of the circumstances" standard?

3. Was respondent entitled to an evidentiary hearing in federal habeas corpus?

4. Did the respondent fail to exhaust his state remedies or otherwise "abuse" the writ of habeas corpus?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The State omits to present the relevant 1957 New Jersey Statutes and Rules pertaining to the issues of arraignment delay and compelled psychiatric interviews. N.J.R.R. 3:2-3 and N.J.S. 2A:163-2. They are set forth in Appendix A to this Brief together with the full relevant federal habeas corpus statute, 28 U.S.C. § 2254, amplifying the excerpts printed in the Petition.

In addition, Rule 52(a), Fed. R. Civ. Proc. provides, in relevant part:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially . . . . Findings of fact shall not be set aside, unless clearly erroneous and due regard shall be given the opportunity of the trial court to judge of the credibility of the witnesses.

INTRODUCTORY STATEMENT

At his trial in 1957 six in-custody statements of the respondent, Edgar Smith, were used to convict him: (1) oral admissions at 10:00 a.m. after a sleepless night of interrogation; (2) a transcribed Q. and A. at noon; (3, 4, 5) three statements to State psychiatrists; and (6) a ratifying admission knowingly and deceptively obtained after indictment in the absence of retained counsel.

Prior to this ten-day habeas corpus proceeding in which more than 1500 pages of testimony were taken, principally from State officials, *no court,* state or federal, including the original trial court, had heard so much as one word of testimony pertaining to the constitutional status of five of these statements. The transcribed Q. and A. was subject to a peculiar and truncated hearing at trial, held partly in and partly out of the presence of the jury. The trial hearing yielded less than 30 pages of testimony and dealt almost exclusively with the circumstances of the noontime questioning itself, thereby all but ignoring the 13 hours of questioning that had preceded it.

The trial court found no specific facts. Indeed its "findings" are so starkly at odds with the evidence presented here by the State's own witnesses that they speak eloquently to the need for such evidentiary hearings where, in the terms of 28 U.S.C. § 2254(d) and *Townsend* v. *Sain,* 372 U.S. 293 (1963), "the material facts were not adequately developed" or "not resolved" at the State court trial. The trial court "found" as follows:

> On the question of voluntariness the Court finds there is *no evidence* of duress or persuasion, any inducement offered, any promise offered, *no evi-*

> *dence* of either physical or verbal duress of any kind upon the defendant *at the time the questioning took place.* (Emphasis supplied) (T. 525a) [1]

For fourteen years, virtually from the start of his incarceration, respondent sought judicial relief from these naked "findings." Critical allegations such as official interference with access to wife and counsel were urged well before such cases as *Haynes* v. *Washington,* 373 U.S. 503 (1963) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) gave full prominence to them in coercion analysis.[2] Yet petition after petition was denied, *without a hearing,* relying solely on the skeletal state court record. It is thus utterly misleading for the State to say here, as it does repeatedly in lengthy footnote 1, (Pet. 6-7) that prior denials of relief have rested upon "extensive review of the facts" or "thorough review of the facts and circumstances," or "fully adjudicated" proceedings. For, although this habeas petition was filed in 1965, it was not until this Court remanded this case, *Smith* v. *Yeager,* 393 U.S. 122 (1968), rejecting allegations of "waiver" and "abuse of the writ," that the first and only evidentiary hearing was held.

At the habeas hearing, the State's own witnesses brought to light for the first time what *really* had happened during Smith's night-long detention prior to the

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[1] References (T.) are to the transcript of the original trial. References (H.) are to the transcript of this habeas corpus proceeding. References (Pet.) are to the State's Petition filed here.

[2] See e.g., Exhibit B to the Petition for Writ of Habeas Corpus, Affidavit dated January 30, 1962. It is contained in the Record of this case which has been forwarded to this Court in connection with the State's petition.

formal noontime Q. and A. The level of interrogation throughout the night was established as "far from casual or routine" and designated to "wear down resistance to meaningful interrogation."[3] Allegations of denial of access to his wife and the State's attempt to derail her from contacting counsel were substantiated. The absence of warnings of any kind was confirmed. Evidence of threatening, if mild, physical abuse was confessed. A backroom interrogation at 10:00 a.m., planned "to get this guy to talk" and to include coercive suggestions of leniency and provocation, was firmly established, for the first time, by the officials responsible. And both investigating prosecutors acknowledged that although arraignment was required under New Jersey law early in the morning and would have supplied the missing warnings, it was intentionally delayed for 7 hours for no purpose other than to obtain a "voluntary" statement in a form usable at trial. (Pet. 42a, 22a; H. 604, 608, 612, 620, 1008-09, 1044ff, 1086ff, 1107-08).

These are but a few of the "new facts" brought to the surface by the first full hearing into the circumstances of Edgar Smith's prolonged incommunicado detention. The State's suggestion that "no new facts" were elicited is perhaps the most colossal of its distortions of the record. (Pet. 25). But the motivation for such a tactic is transparent. Having failed to con-

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[3] The State persists in characterizing the 13-hour-long interrogation as taking place "intermittently at a relaxed pace." (Pet. 14). This characterization is typical of its attempts in this Court to relitigate the facts and otherwise understate, tone down, and wholly ignore testimony produced by its own witnesses. These attempts to circumvent the "clearly erroneous" standard of review, Fed.R.Civ. Proc. 52(a), fell flat in the Court of Appeals. Other instances are noted elsewhere in this Response.

vince the Court of Appeals that the District Court clearly erred in its findings of fact, Fed. R. Civ. Proc. 52(a), the State now contends that those facts had always been clearly established.[4]

COUNTERSTATEMENT OF FACTS

For a full statement of the facts, we respectfully refer this Court to the exhaustive opinion of the District Court.[5] (Pet. 7a-46a). The basic factual elements, however, should be recounted here.

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[4] The State's limited conception of a "new fact" explains why it finds none. Consider just one example. Comparing this case with the case presented in 1963 *on the state record* to the Third Circuit, *Smith* v. *New Jersey*, 322 F.2d 810, the State observes that arraignment delay was known then, as now. But it ignores the new disclosure in this hearing that the arraignment was delayed for the express and only purpose of obtaining the statement. Yet it was precisely the absence of such evidence of "purpose", that enabled the 1963 Third Circuit to distinguish this case from *Mallinski* v. *New York*, 324 U.S. 401 (1945). See *Smith* v. *New Jersey*, *supra*, at 811. *See also*, *Spano* v. *New York*, 360 U.S. 315, 323-24, for the consequences of a showing that officers had an "undeviating intent" to get a statement.

[5] These findings were largely undisputed (Pet. App. 39a) and the State's effort to show "clear error" on appeal was utterly unavailing. Fed.R.Civ.Proc. 52(a). The Courts of Appeal are in full accord that factual findings by the District Court in habeas corpus are governed by the "clearly erroneous" standard of review under Rule 52(a). See *e.g.*, *United States ex rel Wiggins* v. *Pennsylvania*, 430 F.2d 650 (3rd Cir. 1970); *Barber* v. *Gladden*, 327 F.2d 101 (9th Cir. 1964); *Linebarger* v. *Oklahoma*, 404 F.2d 1092 (10th Cir. 1968); *Brown* v. *Crouse*, 425 F.2d 305 (8th Cir., 1970).

On the ultimate issue of voluntariness, the Court of Appeals makes, and made here, an "independent review" of the record.

A. An Overview of Coercive Effect

This record is remarkable for the concrete picture it presents, painted by the State's own witnesses, of a subject's gradual collapse under mounting coercive pressure. The breakdown interrogation took place at 10:00 a.m., after a sleepless night of repeated questioning. Prior to 2:00 a.m., at police headquarters, Smith "appeared normal, he appeared courteous, he didn't appear concerned at all". (H. 190). Some of the State's witnesses described him as "calm, cool, collected" (H. 178), "confident" (H. 209), even "cocky" (H. 538). By 2:30 a.m., after 3 hours of questioning and a trip in the cold to check his story, a detective described Smith as "quite subdued, he was hanging his head, where he hadn't done that previously". (H. 209).

By early morning, after the questioning had become "more distinctive or more impressive" (T. 481, H. 1201), after a second trip in the cold under armed guard, after hairs had been pulled from his head (T. 671, H. 1201, 1411), after his request to phone his wife was denied (Pet. 18a, 20a, H. 1282-83), and after he had been stripped for examination, the State's doctor described Smith as "very restless and apprehensive and markedly agitated" (H. 546, 568). Shortly after 9:00 a.m. (H. 67), now at the Prosecutor's office amid a mounting crowd of press and populace, and in a room with 7 detectives (H. 264), after he had been confronted with bloody trousers (H. 67), and after scrapings had been taken of his fingernails, Smith was driven to say, "I am getting out" and "he started to get up".[6] (H. 279). He was pushed back into his

[6] Smith's exasperated state of mind by this time is nowhere better manifest than by this purported attempt to escape from a room full of detectives into the halls of the prosecutor's office in a courthouse crowded with press, laymen and other officials.

chair, and fell backward onto the floor. (H. 279-80, 332, 395). Minutes later, garbed now in prison coveralls (H. 104, 265) and "closeted" in isolation for a planned interrogation (H. 791, H. 1038, 355, 337-365), including an implied promise of leniency, at the hands of experienced interrogators (H. 371) who had worked together before (H. 797), Smith "broke down. He sobbed". (H. 775, 294-5). His first admissions of contact with the victim came forth.

The lead interrogator testified that the "underlying point" of this culminating interrogation was to "get this guy to talk". (H. 377). And that plainly worked.

B. The Details of Coercion

(1) Statement #1—the 10:00 a.m. Breakdown

Smith was taken by two detectives, acting under orders to bring him to Police Headquarters at about 11:00 p.m. (H. 651). As the District Court found, he was, from the start, under the impression that he was in custody, never advised otherwise, and in fact in such custody. (Pet. 13a). (H. 46, 81-83, 222-23, 621-622, 536). All through the night and morning he was never free of official presence or left unguarded. He was never warned of any rights (H. 226, 518, 623). He was never permitted to sleep and was ill and could eat little.[7] Virtually from the outset, he was subjected

[7] Relitigating still, the State tells this Court that he was "supplied with food and drink on a regular basis", (Pet. 14) and "had breakfast." (Pet. 8). The District Court found that he was offered food twice (Pet. 14a, 18a), could not eat at first, but "probably did eat something" at breakfast, though he was, as he testified, "undoubtedly tense and ill", at breakfast time. He was not offered lunch and did not eat again until many hours after his statement was obtained.

to questioning by relays of skilled prosecutors and detectives from the prosecutor's office. The District Court found that as early as 2:30 a.m. interrogation became intensive. (Pet. 15a, T. 481, H. 1068, 1070-74, 1201). Before long, he was asked to visit the morgue, a technique found to be a part of a mounting process geared to wear down his resistance to questioning. (Pet. 15a, H. 1068, 1070-74).

During the night, Smith was twice taken on extended trips in the cold. The questioning continued throughout and by 4:00 a.m., at the latest, (Pet. 21a) he was the "prime suspect and focus of the investigation." Indeed, the State paid no attention to anyone else from that point on.

At about sunrise, in the presence of an armed guard, Smith was taken to a diner. There he "probably" had something to eat but was "undoubtedly tense and ill." (Pet. 18a, H. 1274). When he requested permission to telephone his wife or to be driven to his mother-in-law's home nearby, his requests were denied. (Pet. 18a). Thereafter, he was stripped naked for a medical examination in the presence of a detective and the State's doctor found him apprehensive and markedly agitated. (H. 567, 568, Pet. 19a).

At about 8:30 a.m. Smith was taken to the Office of the Prosecutor at the Hackensack Courthouse where the breakdown interrogation took place at 10 a.m. There his knee injuries were photographed by a press photographer, and detectives then took his fingerprints, fingernail clippings, and scrapings. Earlier that evening a sample of hair had been pulled from his head although Smith had asked to do it himself.

Prior to the breakdown questioning Smith was permitted to call his wife, but after officials heard him ask her to contact a specific attorney, a detective was dispatched to pick her up. Her presence at the Courthouse was then made known to Smith, and he realized that his "effort to reach an attorney had been frustrated. . . ." (Pet. 41a, H. 1284). Smith then made an "effort to leave" (Pet. 42a), but was forcibly pushed into a chair and fell backwards onto the floor. (H. 279-80, 332, 395). His clothing was then removed and he was garbed in prison coveralls for the critical interrogation. At this time the State already had the list of incriminating items set forth in the District Court's opinion, more than ample for arraignment. (Pet. 21a).

The breakdown interrogation was conducted by a new and well-rested team of two experienced detectives. They testified that Smith was "closeted" for a formal interrogation. (H. 268, 360-61). The questioning proceeded according to a pre-conceived plan designed to culminate in a question, carefully timed, that would assume Smith's involvement with the girl but suggest that he was provoked. The lead interrogator testified that he had learned, and applied here, certain techniques: Develop a common ground with the suspect, in this case religion, to win his confidence. Then establish a difference between the interrogator and his subject, in this case by emphasizing scientific techniques that would soon solve the crime. Then suggest that the victim may have been partly responsible for the incident. (See e.g., H. 335-365). It was in this connection that a discussion took place about another case which pointedly contained an implied suggestion that lenient treatment would be accorded those who coop-

erated. Smith was then told that in this case "whoever committed the act must have done so with great provocation". (H. 351-360). The critical question was then put to him: "What did she do to you?". He broke down, cried, and admitted that "She hit me". This was the first time he had acknowledged any connection with the girl on the night of the homicide.[8]

At some later point, Smith was permitted to speak with a priest. Although the State characterizes this as a mitigating influence, in fact the idea was advanced by an interrogator as part of the "religion" phase of the interrogation plan, (Pet. 24a, H. 800, R. 40), and accepted by the Prosecutor when he was told that Smith wanted "to make a confession". (H. 366-67). Just prior to this meeting with the priest, Smith was permitted to talk with his wife in the presence of at least one prosecutor.

(2) Statement #2—the Q. and A. Statement

Although these events took place in the courthouse equipped for arraignments, arraignment was deliberately delayed until late in the afternoon. Instead, the judiciary was called upon to assist in arranging a formal Q. and A. interrogation. Although no "disinterested witness" was privy to any prior questioning, the Assignment Judge obtained a member of the current jury panel to serve in that capacity at the formal session. A court reporter was likewise relieved of regular work to record the Q. and A. The prosecutor then put more than 300 questions to Smith in the Courthouse and at the scene of the crime. The session

[8] Smith has maintained that he was with the girl on the night of the homicide but was not responsible for her death.

at the Courthouse was secretly taped by means of a hidden microphone.

The secret electronic recording of this Q. and A. was disclosed for the first time at this hearing. It contains not only the orderly formal interrogation but inadvertent moments after it which, by their contrasting frenzy, point up the staged quality of the formal Q. and A. The District Court specifically found that: "The calculated steps taken to give an appearance of voluntariness during this interrogation are not convincing". (Pet. 43a).

(3) Statement #3—the Post-indictment "Accuracy" Admission

In the ensuing days, Smith was indicted and his family retained a lawyer. His lawyer informed the Prosecutor that he had given Smith instructions not to sign any statement. Nonetheless, undaunted *even after indictment, cf. Massiah* v. *United States,* 377 U.S. 201 (1964), the Prosecutor's Office dispatched a Detective to Smith's cell to get Smith to sign the transcribed Q. and A. or acknowledge its "accuracy". Smith followed his lawyer's advice and refused to sign but, unknown to him, an acknowledgment of "accuracy" was as lethal as a signature. It was used at trial as an acknowledgment, not simply that the statement had been properly transcribed, but that its truth-content was "accurate". In short, the Prosecutor had deceptively skirted the instructions of Smith's counsel and obtained a second confession ratifying the substance of the first. (T. 521, 633, 963). At this habeas hearing, the prosecutor who conducted the Q. and A. confessed that an "accuracy" acknowledgment would have been desired by his office to add to the "weight" to be

given to the prior statement.[9] (H. 725). And the District Court held that when Smith was confronted with the transcript of the prior coerced Q. and A., the ensuing "accuracy" admission was clearly "come at by exploitation" of the primary illegality.[10] *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963) (Pet. 44a).

(4) Statements 4, 5 and 6— the Psychiatric Interviews

In between indictment and the accuracy admission, Smith was removed three times from his cell by court order for the purpose of interviews with State psychiatrists. Smith's counsel consented to these interviews, described at this hearing by the Prosecutor as "routine . . . to find out what the mental status of an accused was at the time of commission . . ." (H. 1026). The District Court found that counsel's consent and the court orders were given pursuant to a common understanding at the Bar that the substance of such interviews could be used at trial only on the issues of

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[9] The State's distortion of the facts in this Court is nowhere better dramatized than in its presentation of this event. Wholly omitting to tell this Court that the Prosecutor's office was fully aware of counsel's instructions and sought to skirt them in counsel's absence, the Petition paints the following innocent picture:

> On March 11, 1957, Smith was confronted with a transcript of his stenographically recorded statement. Smith was requested to read the transcript, make any necessary corrections, and sign it. Smith read it and acknowledged its accuracy, but refused to sign it under advice of counsel. His acknowledgment of the accuracy of the statement as well as the statement itself were admitted at trial. (Pet. 11)

[10] Although a clear violation of the subsequently announced *Massiah* rule was involved, the District Court did not apply *Massiah* retroactively to this case. (Pet. App. 43a).

insanity or incompetence. (Pet. 33a-36a). At trial, when Smith had different counsel, these interviews, which encompassed references to events on the night of the homicide, were used to buttress the truth content of the prior Q. and A.[11] (T. 773-74, 931). At the habeas hearing, *the State sought admission of these psychiatric statements* on the grounds that they bore upon the issues of the voluntariness of the prior statements. Anticipating that the State sought to have it both ways—both to interject these statements at this hearing, and to avoid a ruling on their status at a possible retrial—petitioner asked the Court, upon the full record compiled herein, to rule upon their status so as to avoid still further future litigation about the confessory aspects of the Smith case.[12] (H. 8-15, 1513-1528). The District Court found that use of these statements should have been prohibited at trial for two reasons: (1) they resulted from the unbroken chain of coercive events, and (2) they were effectively compelled, since the consent permitting the interviews was given in the shadow of the court's power to order them even if consent were withheld. (Pet. 44a-45a).

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[11] The State understates the use of these statements at trial. They were not used simply to impeach Smith's credibility. (Pet. 31). They were used in summation as direct evidence of the truth of the prior Q. and A. (T. 931). *Harris* v. *New York*, 401 U.S. 222 (1971) is thus inapposite. (Pet. 31-32).

[12] The contention that Smith failed to exhaust State remedies with respect to statements *the State itself* brought into the hearing is thus frivolous. See point 3, *infra* at p. 21.

REASONS TO DENY THE WRIT

1. The Coercion Analysis Was Sound

The factual findings of the District Court, affirmed *in toto* by the Court of Appeals, are fully supported by the record and no question under the "clearly erroneous" standard of review is presented. Rule 52(a), Fed. R. Civ. Proc.

The unanimous legal conclusions of both courts presents only the question whether 1957 coercion law was sufficiently developed to warrant the findings of involuntariness. This Court should not sit to assess the status of its cases as of a given year.

Moreover, that assessment was properly performed below. The central statements leading to the grant of habeas corpus were the ones obtained behind the scenes at 10 a.m. and then in the show of "voluntariness" at the noontime Q. and A. The courts below properly applied the "totality of the circumstances" test in assessing voluntariness of these pre-*Miranda* statements. See e.g. *Fikes* v. *Alabama,* 352 U.S. 191, 197 (1957); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966); *Davis* v. *North Carolina,* 384 U.S. 737, 739 (1966). The courts below did not, as the State charges, void Smith's conviction on a *per se* retroactive application of the *Miranda* rules. The absence of warnings was properly regarded relevant in the voluntariness determination, *Johnson* v. *New Jersey, supra* at 730, but not dispositive. (Pet. 39a).

The State errs too by misreporting the pre-1957 coercion cases. For example, *Malinski* v. *New York,* 324 U.S. 401 (1945) is presented in the Petition as involving "the confession of a suspect held incommunicado for four days in various locations until he con-

fessed. The confession followed continuous questioning". (Pet. p. 15 n. 4). In fact, the coerced *Malinski* confession was obtained after only 10 *hours* of daytime detention, at a hotel, and without persistent questioning. 304 U.S. at 403, 405. Although no two cases are precisely alike and *Malinski* presented its own aggravating circumstances, they were by no means more coercive than those presented here. This case includes, among many coercive events, an unlawful element of interrogative technique repugnant even to the staunchest advocates of vigorous interrogation—the implied promise of leniency.[13] *Inbau, Police Interrogation—a Practical Necessity,* 52 J. Crim. L. C. and P.S. 16 (1961). And the rest of the interrogative plan brought to bear upon Smith at 10:00 am. was likewise modeled upon a standard coercive pattern.[14] Moreover, other coercive features of the case were also established, by 1957, as relevant in voluntariness analysis. See e.g., *Turner* v. *Pennsylvania,* 338 U.S. 64 (1948) (absence of right to silence warnings, arraignment delay) *Watts* v. *Indiana,* 338 U.S. 49, 53 (1949) (warnings, experi-

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[13] "I am opposed, therefore, to the use . . . of threats, or promises of leniency . . . which will induce *an innocent person to confess.* . . ." Inbau, *supra* (emphasis is original).

[14] The alternating pattern of hard and soft questioning—establishing rapport but conveying confidence in police detection, culminating in a suggestion that the victim may have provoked the event—was established in interrogation manuals no later than 1953. See Inbau and Reid, *Lie Detection and Criminal Interrogation* (3rd ed. 1953); O'Hara, *Fundamentals of Criminal Investigation,* Cr. 9 (1956). This Court acknowledged the coercive impact of such psychological ploys earlier than 1957. See e.g., the interrogator's suggestion of the victim's provoking behavior in *Leyra* v. *Denno,* 347 U.S. 556, 562, 582 (1954). For dramatic evidence of their continued use in coercive settings, see Savage, *A Great Fall* (1970).

enced interrogators, arraignment delay, absence of counsel).

The coercion findings as to the other four statements are not critical to the grant of habeas corpus, but are relevant instead to retrial. There is no reason to review them now. Moreover, on the merits, these findings were correct.

The post-indictment "accuracy" admission is the clearest example of a fruit of prior coercion. The State could not possibly contend that it was derived from an "independent source". *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). Nor could it credibly suggest that the taint of the prior illegality had been "attenuated" by intervening events. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). The *Wong Sun* test of attenuation disposes of any such suggestion:

> Whether, granting the establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. 371 U.S. at 488.

If ever a second confession was "come at" by "exploitation" of an illegal preceding one, it was at the moment the Prosecutor's detective presented Smith with the transcript of the coerced Q. and A. and asked him to acknowledge its "accuracy".[15]

The three psychiatric statements, taken between the time of the Q. and A. statement and the post-indictment

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[15] The status of the "accuracy" admission as a fruit thus enabled the District Court to avoid reaching the questions whether: (a) the deceptive circumstances of this "confession" rendered it independently coerced and (b) the *Massiah* rule, plainly violated here, should be retroactively applied.

"accuracy" admission, were barred from use at retrial upon two grounds: (1) as intermediate links in the chain of coercive events (Pet. 44a); (2) as, in effect, compelled by court order. (Pet. 44-45a). Their role as intermediate links in the chain is manifest in the State's "undeviating intent" *Spano* v. *New York*, 360 U.S. 315, 323-24, to get usable statements from Smith—an intent that did not let up even days after he was indicted and represented by counsel.[16] In addition, the District Court found that Smith's counsel agreed to the psychiatric interviews only because, in the absence of consent, they could be compelled by court order. N.J.S. 2A: 163-2. Such agreement was customary at the Bar upon the understanding that interviews by consent, like those by court order, could only be used if the sanity question were raised at trial. Since Smith's counsel had instructed him not to sign the Q. and A., it is unthinkable that he would have licensed a new and unlimited interrogation in medical disguise, and the District Court so found. This finding, which is but

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[16] That intent was confessed by the prosecutor as the sole reason for the 7-hour arraignment delay. And the deceptive circumstances of the "accuracy" admission confirm that the intent persisted even after indictment, through the time of the psychiatric statements, until the "accuracy" admission was obtained. This Court has written, in terms fully applicable here:

> The police were not . . . merely trying to solve a crime, or even to absolve a suspect. . . . They were rather concerned primarily with securing a statement from defendant on which they could convict him. The *undeviating intent* of the officers to extract a confession from petitioner is therefore patent. *When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.* *Spano* v. *New York*, 360 U.S. 315, 323-4. (emphasis supplied).

an alternative ground for exclusion at retrial, does not entail retroactive application of the Fifth Amendment privilege.[17] Cf. (Pet. 30).

2. An Evidentiary Hearing Was Mandatory

On remand from this Court, the State advised the Court of Appeals that Smith was entitled to an evidentiary hearing. In the District Court, it reversed that position and contended, *inter alia,* that Smith's counsel had waived a voluntariness hearing at trial by failing to object to the Q. and A. as involuntary. The trial record belied that, since although counsel wavered at first, a voluntariness challenge was made.[18] (T. 532, 534, 537).

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[17] The District Court referred to cases on the privilege against self-incrimination (Pet. 44a-45a) only for a third buttressing argument. Since counsel's consent was given in the shadow of the court's power to order these interviews, Smith's participation was not voluntary but effectively compelled by that power. In some forms, *actual* compulsion, which may be regarded as the core of the Fifth Amendment privilege, has always been repugnant to the Fourteenth Amendment even though all the particulars of the Fifth Amendment privilege (e.g., the comment rule) were not made applicable to the States until *Malloy* v. *Hogan,* 378 U.S. 1 (1964). Even the dissenters in *Malloy* acknowledged that much.

> ". . . coercion to incriminate oneself, even when under the forms of law . . . is inconsistent with due process." 378 U.S. 1 at 15, note 1 (Harlan J. dissenting).

As the District Court observed, *Twining* v. *New Jersey,* 211 U.S. 78 (1908) and *Adamson* v. *California,* 332 U.S. 46 (1947) held only that the Fifth Amendment is not binding upon the States. They dealt with a fringe Fifth Amendment protection (the comment rule) and did *not* hold that all forms of compulsory self-incrimination were consistent with Fourteenth Amendment Due Process.

[18] The initial failure to challenge voluntariness may well have resulted from the circumstance that under 1957 New Jersey discovery law, counsel did not receive a copy of the statement until the middle of trial. Moreover, the initial testimony on the Q. and A. was taken in the inhibiting presence of the jury.

Faced with the obvious truths that, as to the Q. and A., the "material facts were not adequately developed at the State court hearing" and as to the other statements, "the merits of the factual dispute were not resolved [at all] in the State court hearing," 28 U.S.C. § 2254(d)(3) and (d)(1), *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963), the State sought to avoid the otherwise mandatory evidentiary hearing, *Townsend* v. *Sain*, *supra* at 313, by arguing *from the trial transcript* that these inadequacies must have been attributable to the "inexcusable neglect of petitioner. . . ." *Townsend* v. *Sain*, *supra* at 317.[19] Although the parties were then engaged in outlining the scope of proceedings, not once did the State offer to take testimony on that point. Moreover, although both petitioner and his trial counsel testified at this hearing, the State never sought to preserve a record by seeking testimony from them on the waiver issue.

In this Court, *without the slightest record on the subject*, the State again presses the waiver point with unfounded and abstract charges that "facts known to [the] petitioner were consciously withheld from the record of the trial proceedings". (Pet. 21). These charges, never specified, are both untrue and utterly unfit for review in this posture.[20]

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[19] That argument was frivolous. The State urged that counsel only partially developed the coercion facts because proving involuntariness was not his objective; he sought, instead, a hearing out of the presence of the jury to show that Smith's statement was not a confession. The complete answer to that argument is manifest in the trial transcript which shows that counsel did not pursue that line of questioning at the non-jury hearing. (T. 539-542).

[20] Did Smith "consciously withhold" evidence of the prosecutor's intent in delaying arraignment or of the interrogation plan hatched out of his presence?

3. There Was No Failure To Exhaust State Remedies

The State does not contend that Smith failed to exhaust State remedies with respect to the Q. and A. statement or the post-indictment "accuracy" admission, either one of which forms an independent basis for the grant of habeas corpus. The contention that he failed to present questions concerning the 10:00 a.m. admissions to the State courts is groundless for three independent reasons: (1) it was never briefed or argued to either court below and is thus raised in this Court for the first time;[21] (2) the 10:00 a.m. admissions were part of Smith's coercion claim in a State petition for habeas corpus denied by the Bergen County Trial Court on March 29, 1965 (Pet. 6, n. 1); and (3) consideration of the coercive events yielding the 10:00 a.m. admissions is a necessary part of the "totality of the circumstances" leading to the Q. and A. two hours later.

The exhaustion contention with regard to the psychiatric statements is no less groundless. The statements were offered at this hearing *by the State*. Since that offer itself raised a question as to the scope of consent given in 1957, the issue of the nature of that consent was subjected to full litigation. And since the consent question is the only issue relevant to determining their voluntariness, the District Court rejected the State's attempt to withhold the voluntariness question for some future proceeding. No considerations of "comity" required the District Court to permit the State to splinter consideration of the statements it

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[21] Indeed, in pre-hearing memoranda designed to frame the issues for this proceeding, the 10:00 a.m. admissions were specifically delineated without any such objection raised.

offered and postpone still further the final resolution of the confessory aspects of this 14-year old case.[22] Ironically, the State charges Smith with "abuse" of the writ by urging "certain grounds while holding others in abeyance". (Pet. 32). But its effort at "piecemeal litigation" is the only one in this case.

4. There Was No Abuse of the Writ by Smith

The State is surely correct that the history of this case is a "legal labyrinth" (Pet. 32), but the labyrinth is no fault of the respondent, and the charge of "abuse of the writ" is yet another irony. This Court rejected the charge of "abuse" when it remanded for a hearing on this petition. *Smith* v. *Yeager,* 393 U.S. 122 (1968). An earlier petition had been filed prior to *Townsend* v. *Sain, supra,* when the right to an evidentiary hearing was narrowly constricted by *Brown* v. *Allen,* 344 U.S. 443 (1953), but that petition was denied, without an evidentiary hearing. *United States ex rel. Smith* v. *New Jersey,* 201 F. Supp. 272 (D.N.J. 1962), aff'd. 322 F. 2d 810 (3rd Cir. 1963).

This petition was filed in 1965, early in the reign of *Townsend* and after final exhaustion of the search for relief in the State post-conviction process. *State* v. *Smith,* 43 N.J. 67 (1964). For six years, Smith did no more than seek an evidentiary hearing. First, the federal courts blocked him for three years with the "waiver" holding that it took this Court to upset.

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[22] The State concedes that "comity" is not a jurisdictional doctrine. (Pet. 23, note 10). Permitting the State to use these statements, but postpone resolution of the issues they raise even when a complete record has been compiled, would have worked "manifest injustice" sufficient to overcome the interest of comity. *Fay* v. *Noia,* 372 U.S. 31, 420-441 (1963).

Smith v. *Yeager, supra.* Indeed, even after this Court's remand, it took two more years before the New Jersey District Court even set a date for the hearing which finally vindicated him. Until this hearing, no court, State or Federal, had heard evidence as to five of the six statements ultimately held coerced. Only the trial court heard some testimony on the sixth. The charge of "systematic relitigation" is thus baseless, for it is simply false to say that Smith's "applications for habeas corpus and post-conviction relief were considered and rejected on their merits". (Pet. 33). They were considered and rejected, time after time, on no more than the moving papers and the scant trial transcript.

In short, Smith has "relitigated" nothing. Save for some evidence as to one statement at trial, this case represents the first litigation of the truth of Smith's claims. The truth is now known. That it took a fourteen-year struggle just to give it a hearing may be an abuse, but is not an "abuse" of the Writ that finally prevailed.

It "needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. . . . We must be deaf to all suggestions that a valid appeal to the Constitution . . . comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands". *Chessman* v. *Teets,* 354 U.S. 156, 165 (1957). (Harlan, J. for the Court). See also, *Sheppard* v. *Maxwell, cert. den. sub. nom. Sheppard* v. *Ohio,* 352 U.S. 910 (1956); *cert. granted,* 382 U.S. 916 (1965), rev'd., 384 U.S. 337 (1966); *Rogers* v *Richmond, cert. den. sub. nom.; Rogers* v.

Connecticut, 351 U.S. 952 (1956), *cert. den.* 357 U.S. 220 (1958), cert. granted, 361 U.S. 959 (1960), rev'd. 365 U.S. 534 (1961).

CONCLUSION

It is respectfully prayed that the petition for writ of certiorari be denied.

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APPENDIX

Statutes Involved

1. 28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,

unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs

numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

2. N.J.S. 2A:163-2. Finding of Insanity; Disposition

2A:163-2. Finding of insanity; disposition

If any person in confinement under commitment, indictment or under any process, shall appear to be insane, the assignment judge, or judge of the county court of the county

in which such person is confined, may, upon presentation to him of the application and certificates as provided in Title 30, chapter 4, of the Revised Statutes, institute an inquiry and take proofs as to the mental condition of such person. The proofs herein referred to may include testimony of qualified psychiatrists to be taken in open court by the judge, either in the presence of a jury specially impanelled to try the issue of insanity alone, or without a jury, as the judge in his discretion may determine. It shall be competent for the judge if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.

If it shall be determined after hearing as aforesaid, that the accused was sane at the time the offense charged against him is alleged to have been committed, but is insane at the time of the hearing, the judge shall order such person removed from imprisonment and to be confined in an institution as provided by section 30.4-82 of the Revised Statutes, and his custody and release from such institution shall be governed by the provisions of said section.

If it shall be determined after hearing as aforesaid, that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be, shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason, and no person so confined shall be released from such confinement except upon the order of the court by which he was committed. This section shall

not be construed to prevent the use of the writ of habeas corpus.

A finding of sanity at the time of the commission of the offense charged against such person in this proceeding shall not preclude the accused from interposing the defense of insanity at any subsequnt trial of the offense charged.

Rules Involved

1. N.J.R.R. 3:2-3

Proceedings Before the Magistrate

(a) Appearances

An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.

(b) Statement of the Magistrate

The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him.